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### Hong Kong's Endgame and the Rule of Law (II): The Battle of "the People" and the Business Community in the Transition to Chinese Rule

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# HONG KONG'S ENDGAME AND THE RULE OF LAW (II): THE BATTLE OVER "THE PEOPLE" AND THE BUSINESS COMMUNITY IN THE TRANSITION TO CHINESE RULE

JACQUES DELISLE\* & KEVIN P. LANE\*\*

## 1. INTRODUCTION

Transitional Hong Kong's endgame formally came to a close with the territory's reversion to Chinese rule on July 1, 1997. However, a legal and institutional order and a "rule of law" for Chinese-ruled Hong Kong remain works in progress. They will surely bear the mark of the conflicts that dominated the final years preceding Hong Kong's legal transition from British colony to Chinese Special Administrative Region ("S.A.R."). Those endgame conflicts reflected a struggle among adherents to rival conceptions of a rule of law and a set of laws and institutions that would be adequate and acceptable for Hong Kong. They unfolded in large part through battles over the attitudes and allegiance of "the Hong Kong people" and Hong Kong's business community.

*Hong Kong's Endgame and the Rule of Law (I): The Struggle over Institutions and Values in the Transition to Chinese Rule ("Endgame I")* focused on the first aspect of this story. It

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\* Assistant Professor, University of Pennsylvania Law School. This Article is the second part of a two-part series. The first part appeared as *Hong Kong's Endgame and the Rule of Law (I): The Struggle over Institutions and Values in the Transition to Chinese Rule*, 18 U. PA. J. INT'L ECON. L. 195 (1997), as part of this Journal's symposium issue on Hong Kong's transition from British colony to Chinese Special Administrative Region. The authors thank Richard Sik-Wing Au, Jennifer Shiu-Li Fan, and Beatrice Mohini Schaffrath for research assistance, and Natasha J. Song and the staff of the *Journal* for their inexhaustible patience and exhaustive editorial work. Support for this Article, and the broader project on the law and politics of Hong Kong's reversion to China of which this Article is a part, was provided by the University of Pennsylvania Research Foundation.

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examined the political struggle among members of two coherent, but not monolithic, camps, each bound together by a distinct vision of law and sovereignty in the domestic realm. The People's Republic of China ("P.R.C." or "China") and its allies and surrogates in Hong Kong approached issues of the rule of law and legal institutions from a primarily positivist perspective, invoking procedural standards of legitimacy and insisting upon substantive sovereign discretion. A looser alliance of Hong Kong's "liberal" or "pro-democracy" politicians and the colonial and British governments proceeded from a perspective grounded in more "natural law"-like principles. They asserted that legitimate legal rules and institutions had to meet substantive standards of what justice demands of a good sovereign.

*Endgame I* examined how the political clash between these two camps was highly polarized and how the camps were, to varying degrees, unstable and fragmented internally during the 1990s. These seemingly paradoxical traits, *Endgame I* argued, stemmed from the endgame's inevitable focus on quite specific aspects of a legal and institutional order for the S.A.R. On one hand, the endgame's focus on these final and highly concrete issues of Hong Kong's transition made it impossible for the participants to avoid addressing fundamental conflicts between their perspectives by postponing hard questions until later rounds of bargaining and conflict. This focus on matters of legal and institutional detail also made it harder for the participants to shroud the fault lines between their visions in the ambiguities of the broad "framework" laws and agreements on Hong Kong's future order that had been the main concern of earlier phases of negotiations. On the other hand, the endgame's emphasis on specific legal and institutional arrangements exposed how each broad vision of law was sufficiently indeterminate to permit its adherents to adopt disparate and shifting positions on the specific controversies of the era while credibly claiming to be faithful to the vision's core principles.

Two contingent political events that marked the beginning of the endgame, the Tiananmen Incident of June 4, 1989 ("Tiananmen Incident") and the installation of Christopher Patten as Hong Kong's last colonial governor in 1992, also contributed to the pattern of sharply clashing yet substantially indeterminate visions. On one hand, these developments deepened the political rift between Hong Kong liberals, democrats, and colonial officials on one side and the P.R.C. and its allies on the other. The crack-

down on the Beijing protests and Hong Kong's reaction to it seemed to lay bare fundamental gaps between the perspectives on law and governance dominant in the P.R.C. and in the territory. Patten's agenda of legal and institutional reform, his methods for pursuing it, and China's reaction to Patten's goals and means all seemed to point to a widening of the gaps that the Tiananmen Incident had exposed. On the other hand, the pair of political developments that signaled the endgame's beginning also heralded the emergence of a complex and volatile political environment in Hong Kong. This environment was conducive to divergent and changing assessments within each camp about what strategies were politically possible or prudent in the quest to settle the legal and institutional questions of transitional Hong Kong's endgame on favorable or acceptable terms.

This Article takes up the second aspect of the story of Hong Kong's endgame. It focuses on the battles that the key political participants, who comprised the two blocks identified in *Endgame I*, fought over "the people" of Hong Kong and Hong Kong's business community. In Hong Kong in the 1990s, these two social constituencies appeared to be potentially vital allies or formidable opponents for the principal political actors who were striving to establish their preferred legal or institutional arrangements in the final run-up to reversion, in what *Endgame I* called a "colloquial" endgame scenario. These constituencies also seemed to be promising sources of effective post-reversion pressure on the S.A.R. regime to implement, go beyond, or retreat from the legal and institutional arrangements formally, but perhaps meaninglessly, adopted during the last years of colonial rule, in what *Endgame I* identified as a "technical" endgame scenario.

As *Endgame I* also indicated, the factors that fostered polarization and intramural schisms and shifts among the principal participants in the political conflicts of Hong Kong's endgame also reinforced the key political actors' determination to obtain support, or at least acquiescence, from the people of Hong Kong and the business community. The focus on concrete legal and institutional questions to which fundamental visions of law mandated no single answer allowed adherents to a particular vision to consider how various arrangements that were arguably acceptable in principle might be received in practice in Hong Kong. They could do so without betraying core principles of the vision of law and sovereignty that they embraced, or sacrificing



the benefits that they thought would accompany a legal and institutional order compatible with those principles. In addition, the vastly more powerful popular politics and the increased politicization of the powerful business community in 1990s Hong Kong made either group's views on legal and institutional issues obviously and immediately relevant to the political struggles of the day. Because the main participants in the political conflict over Hong Kong's future legal and institutional order sought a rule of law that was viable in practice as well as acceptable in principle, they could ill-afford to ignore the attitudes and values of the people or the business community.

Section 2 of this Article discusses the struggle over "the Hong Kong people." Section 2 begins by examining the long-standing impediments to the emergence of an influential popular constituency in Hong Kong politics, the gradual and accelerating pressures for its development and accommodation since the 1960s, and the indications of a growing recognition of "the people" as an important target for prediction and persuasion in the endgame struggle to shape S.A.R. laws and institutions. The discussion also notes the potentially salient fault lines running through the people, whom the key political participants in the struggles of the endgame nonetheless addressed as a near-monolith.

The principal subsections of Section 2 assess, in turn, the "British and Hong Kong liberal-democratic" and "China and 'pro-China' Hong Kong" approaches to the struggle over the people. These subsections examine how members of each of the sometimes internally divided groups sought to claim or cultivate popular backing or acceptance in clashes over general questions of "rule-of-law" values and four key legal-institutional issues of the endgame: the Bill of Rights, including broadly related amendments to laws restricting civil and political liberties; the Legislature, including both the democracy-expanding electoral reform laws introduced by Governor Patten to govern the last colonial elections and the P.R.C.'s decision to install a post-reversion "Provisional Legislature" named by a P.R.C.-selected committee; the Court of Final Appeal ("C.F.A." or "Court"), including issues of its membership, jurisdiction, and establishment date under Sino-British accords reached in 1991 and 1995; and the Chief Executive selection process, including issues raised by the initial occupant Tung Chee-hwa's pre-reversion use of his position as Chief Executive-designate.

Section 2's analysis reveals several common features in the arguments that the key political players addressed to the people. On one dimension, the arguments ranged from claims about the people's existing beliefs, to attempts to persuade, frighten, or coerce the people to adopt preferences that they concededly did not initially hold, to arguments that blended claims that a proposed arrangement was or could be popular with reminders of the political players' ultimate, popularity-indifferent insistence that a legal and institutional solution must satisfy the minimal demands of a favored vision of law, whether Chinese-style positivist or liberal-democratic and broadly naturalist. Along another dimension, arguments ranged from ones that invoked a wide variety of rule-of-law and related normative and political principles, at times claimed to be subjectively important to the people of Hong Kong, to other arguments that focused immediately on ordinary Hong Kongers' pragmatic concerns with stability, prosperity, and predictability. In practice, the result was a rich tapestry of arguments that blurred the lines among analytically distinct claims about actual and potential popular beliefs, popular preferences and interests, and the relative importance of consensus and principle.

Section 3 discusses the battle over Hong Kong's business community and has the same structure as Section 2. Section 3 begins with an account of the business community's long-established political importance in Hong Kong, the extensive measures taken by colonial and P.R.C. authorities to accommodate the business community's interests and preferences in the decades preceding the endgame, and the emergence of the business community as an important object of conflict, and a fairly reluctant participant, in the contentious and highly public political struggles of the endgame. The opening subsection also notes the business community's considerable diversity of political views and politically relevant economic interests — a diversity that the key political participants all but ignored their skirmishes for the allegiance and acquiescence of the elite business sector during the 1990s.

Section 3's main subsections, similar to Section 2's, address, respectively, the British and Hong Kong liberal-democratic block's and the China and pro-China Hong Kong block's approaches to the political battle over the territory's business community during transitional Hong Kong's endgame. As in Section 2, the analysis within each of the two subsections focuses on how members of

each of these sometimes fissiparous camps tried to assert or to develop approval or acquiescence from the business community for preferred positions on broad rule-of-law questions and the four specific legal and institutional controversies of the period. Key political participants made arguments to and about business elites that were similar to their arguments concerning the people. Here too, arguments rooted in rule-of-law and related principles mixed with appeals and threats to more material interests. More than the arguments addressed to the people, they placed special emphasis on arguments that had discernible connections to economic concerns that presumably were at the core of business elites' interests and preferences. Claims about "business" pre-existing preferences mingled extensively with attempts to convince, or to warn, business elites about what they should or must demand or accept. There was, however, seemingly less of an effort to create genuine changes in this target group's apparently less pliable preferences than was the case with arguments addressed to the people.

Finally, a concluding section considers what the battles over the people and the business community in the run-up to Hong Kong's reversion and legal and political developments during the S.A.R.'s first months add to the analysis offered in *Endgame I*. Section 4 first briefly summarizes the pre-reversion patterns analyzed in *Endgame I* and in the principal sections of this Article, and concludes that the evidence remains consistent with a conclusion that key political participants perceived that they were involved in any of the three types of endgames identified in *Endgame I*. Section 4 then notes the continuity in the identities of Hong Kong's main political participants and the changes in their roles since reversion, and sketches key post-reversion events that have continued the story of the major endgame controversies. These events include: early steps to enact new civil liberties-related legislation; litigation concerning the Provisional Legislature's constitutionality, debates about the propriety of the interim body's early post-reversion actions, and the crafting of electoral laws to govern the selection of the first full-fledged S.A.R. legislature; the installation of members of the C.F.A. and a lower court's decision in a case challenging the Provisional Legislature; and Tung Chee-hwa's on-going shaping of the Office of Chief Executive and the S.A.R. administration. Section 4 concludes that Hong Kong seems to have been facing an endgame

that most closely approximates *Endgame I*'s "end of the game / on-going games" scenario, although it remains possible that the more starkly discontinuous "technical" endgame or the more smoothly continuous "colloquial" endgame may ultimately provide a more persuasive account of the struggles to shape a legal and institutional order in transitional Hong Kong.

## 2. RULE-OF-LAW VALUES (I) — THE STRUGGLE OVER THE "HONG KONG PEOPLE"

### 2.1. *The Hong Kong People and Stability*

During the final decade of colonial rule, the participants in the political battle to define the laws and institutions of the Hong Kong Special Administrative Region struggled to claim the allegiance of an ill-defined but assumedly vital group: the Hong Kong people. The territory's citizens became the object of sharp conflict and prodigious efforts to pressure, persuade, and predict. Their views on the rule of law and the specific controversies of the era became a critical element in the territory's prospects for stability — the first half of the universally embraced "stability and prosperity" formula for Hong Kong's future and a prerequisite to achieving the second half.

#### 2.1.1. *The Hong Kong People and the Politics and Government of a Borrowed Place*

It is no small irony that the Hong Kong people became a focus of such an intense struggle on the eve of the final implementation of a deal struck between the territory's past and future rulers. The conventional wisdom long had been that the territory's inhabitants were more concerned with commerce than politics. They were thought to be disinclined or ill-equipped to create pressures for holding the territory's government accountable to its people or for allowing popular participation in the territory's governance.<sup>1</sup> Social and demographic factors encouraged a generally apolitical orientation. For most of Hong Kong's existence, most of the territory's residents have been recent

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<sup>1</sup> See generally LAU SIU-KAI & KUAN HSIN-CHI, *THE ETHOS OF THE HONG KONG CHINESE* 69-117 (1988).

arrivals.<sup>2</sup> Primarily through immigration from neighboring parts of China, the colony's population grew from a few thousand inhabitants of Hong Kong Island in 1842 to 1.6 million in the expanded colony less than a century later, to more than six million by 1995.<sup>3</sup>

During the 1980s, when China and Britain were negotiating Hong Kong's return and the issues of the endgame began to loom on the political horizon, nearly half of the territory's population had been born elsewhere. Generally, these recent immigrants regarded themselves as sojourners or transients, and many planned to return home eventually (if only to be buried) or to use Hong Kong as a platform for moving overseas. Moreover, members of Hong Kong's predominantly Chinese population retained strong cultural and personal ties to their former homes despite the fact that many fled political and economic hardship in the mainland.<sup>4</sup> This peculiar mixture of rootlessness in the territory and rootedness elsewhere inhibited the development of a strong local Hong Kong identity among the bulk of the population.

Geography and politics had a similar impact. On the one hand, a physically and culturally remote imperial power ruled colonial Hong Kong. Such literal and metaphorical distance prevented the vast majority of the territory's residents from regarding themselves as British subjects. The United Kingdom's ("U.K.") nationality legislation, including amendments to the Nationality Act passed partly in response to fears of an influx from Hong Kong, made clear that the U.K. would not accept many Hong Kong residents as full British citizens.<sup>5</sup> More subjects than citizens at home as well, Hong Kong inhabitants had very few opportunities under British colonial rule to participate in the territory's governance. The colonial government excluded Hong Kongers from joining the senior ranks of the civil service,

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<sup>2</sup> See, e.g., Hugh D.R. Baker, *Life in the Cities: The Emergence of Hong Kong Man*, 95 CHINA Q. 469, 470 (1983) (stating that immigrants vastly outnumber native Hong Kongers).

<sup>3</sup> See HONG KONG GOV'T INFO. SERVICES, HONG KONG 1997, at 396, 407-09 (1997).

<sup>4</sup> See LAU SIU-KAI, SOCIETY AND POLITICS IN HONG KONG 157-76 (1984); Ronald Skelton, *Hong Kong in an International Migration System*, in RELUCTANT EXILES? 21-51 (Ronald Skelton ed., 1994).

<sup>5</sup> See generally Hugh D.R. Baker, *Branches All Over: The Hong Kong Chinese in the United Kingdom*, in RELUCTANT EXILES?, *supra* note 4, at 291, 298-305; Skelton, *supra* note 4.

until the adoption of "localisation" policies during the waning years of colonial rule, and from voting for representatives in the colony's weak legislature, until the implementation of electoral and constitutional reforms in the final decade of British control. Under British rule, Chinese Hong Kongers also held relatively few posts in the upper echelons of a judiciary that conducted its affairs in English and that was subject to reversal by the Privy Council in London. While similar restrictions might have triggered a powerful anti-colonialist or revolutionary nationalist reaction, in Hong Kong this legal and political order went relatively unchallenged and proved inimical to the emergence of a politically relevant identity among Hong Kong citizens.<sup>6</sup>

On the other hand, the political implications of the strong ties between Hong Kong residents and the Chinese mainland also weakened prospects for a distinct Hong Kong identity. More than just cultural, those links included Hong Kong's economic dependence on the mainland, the P.R.C.'s military ability to retake the territory by force, and China's long-standing ideological and legal insistence that Hong Kong always has been a part of China's sovereign territory.<sup>7</sup> Together, these circumstances precluded any realistic possibility of independence or self-determination for Hong Kong residents.

Despite these ties, the administrative separation of Hong Kong from the rest of China during the colonial period assured that Hong Kong residents were not fully Chinese, especially in the political dimensions of their lives. Frequently frosty Anglo-Chinese relations and the colonial authorities' determination to

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<sup>6</sup> See LO SHUI-HING, *THE POLITICS OF DEMOCRATIZATION IN HONG KONG* 33-60 (1997); NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 53-181 (5th ed. 1991) (describing the evolution of Hong Kong's governmental institutions under colonial rule); STEVE YUI-SANG TSANG, *DEMOCRACY SHELVED: GREAT BRITAIN, CHINA AND ATTEMPTS AT CONSTITUTIONAL REFORM IN HONG KONG, 1945-1952* (1988); Albert H.Y. Chen, *Law in a Foreign Language: The Case of Hong Kong*, in *HONG KONG: THE CHALLENGE OF TRANSFORMATION* 212-38 (Kathleen Cheek-Milby & Miron Mushkat eds., 1989); Jane C.Y. Lee, *The Civil Service*, in *FROM COLONY TO SAR: HONG KONG'S CHALLENGES AHEAD* 39-50 (Joseph Y.S. Cheng & Sonny S.H. Lo eds., 1995).

<sup>7</sup> See generally James T.H. Tang, *Hong Kong in Transition: Globalization Versus Nationalization*, in *THE CHALLENGES OF HONG KONG'S REINTEGRATION WITH CHINA* 177, 189-94 (Ming K. Chan ed., 1997); see also Anthony Dicks, *Treaty, Suffrage, Grant or Usage? Some Legal Aspects of the Status of Hong Kong*, 95 *CHINA Q.* 427-55 (1983).

keep the mainland's unruly politics out of Hong Kong further limited the development of mainland Chinese influences in Hong Kong. As a result, colonial Hong Kong residents remained strikingly insulated from developments that shaped political identities across the border.<sup>8</sup> In sum, while Hong Kong provided its residents an attractive wealth of opportunities under more than a century of colonial rule, it did not transform them into "Hong Kongers." After more than a century of colonial rule, they were neither British nor fully Chinese. Yet, they also had not become members of a distinct group of Hong Kong people with an identity that could firmly ground popular participation, or a sense of entitlement to participate, in the public life of the territory.<sup>9</sup>

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<sup>8</sup> See generally LAU, *supra* note 4, at 1-13; James T.H. Tang, *World War to Cold War: Hong Kong's Future and Anglo-Chinese Interactions, 1941-55*, in PRECARIOUS BALANCE: HONG KONG BETWEEN CHINA AND BRITAIN, 1842-1992, at 107-30 (Ming K. Chan ed., 1994) (describing Anglo-Chinese interactions in Hong Kong from 1941 to 1955). In the last half-century, the unrest in Hong Kong during the most radical phase of China's Cultural Revolution is a striking exception, one that largely proves the rule. By mainland standards, however, the riots in Hong Kong were fairly minor affairs. The British authorities reacted swiftly to quell them and then undertook political reforms to address local Hong Kong concerns that appeared to create the social discontent that fueled the unrest. See, e.g., JOHN F. COPPER, *COLONY IN CONFLICT: THE HONG KONG DISTURBANCES, MAY 1967-JANUARY 1968* (1970); KEVIN P. LANE, *SOVEREIGNTY AND THE STATUS QUO: THE HISTORICAL ROOTS OF CHINA'S HONG KONG POLICY* 75-78 (1990); MINERS, *supra* note 6, at 32-34; John D. Young, *China's Role in Two Hong Kong Disturbances: A Scenario for the Future?*, 19 J. ORIENTAL ST. 158 (1981). Colonial Hong Kong's isolation from broader Chinese politics together with geographic proximity made Hong Kong the principal destination for those who fled political upheavals and repression in the mainland.

<sup>9</sup> The perpetual awkwardness in finding a term to refer to the people who live in Hong Kong reflects this situation. "Hong Kong residents" is often the preferred English term, but it connotes habitation rather than a distinct identity and membership in a political community. "S.A.R. resident" is a hopelessly one-dimensional and dryly administrative label. The locution "Hong Kong Chinese" is inadequate as well, because it is used primarily to distinguish the territory's ethnically Chinese inhabitants from South Asians and Westerners who live in Hong Kong.

A commonly used P.R.C. term, *gangren*, is perhaps a better label, but it too is ambiguous. In some contexts, it is the equivalent of the English "Hong Kong residents." In much official usage, it is definitively subordinate to Hong Kongers' post-reversion status as Chinese citizens. That is, the core P.R.C. policy of *gangrenzhigang*, Hong Kong people ruling Hong Kong, is a matter of delegating some subsidiary aspects of China's sovereign authority over the territory to inhabitants of Hong Kong who have, in China's view, always been Chinese nationals despite their residence in an area controlled by a colonial power. To complicate matters further, the constitutional and statutory arrange-

Beginning in the 1960s and accelerating in the 1980s and early 1990s, long-developing demographic and economic forces and precipitous political shocks began to change this pattern. The proportion of Hong Kong residents born and raised in the territory rose considerably during the final decades of colonial rule. This created a critical mass of people, including a majority of the territory's residents and an even larger share of the younger generation, who viewed themselves as Hong Kong "belongers," rooted in Hong Kong and sharing a uniquely Hong Kong culture and experience.<sup>10</sup> A 1988 survey captured this shift, finding that almost two-thirds of Hong Kong residents considered themselves "Hongkongese" rather than "Chinese." More than four-fifths claimed to feel "a lot" or "quite a lot" that they belonged to Hong Kong, with striking consistency across socioeconomic groups.<sup>11</sup>

Over roughly the same period, Hong Kong underwent a sweeping economic transformation. Hong Kong's gross domestic product grew at an average annual rate of seven percent between 1975 and 1995.<sup>12</sup> By 1994, Hong Kong's per capita gross domestic product was approximately eighty-four percent of that of the United States.<sup>13</sup> Particularly in the 1970s and after, Hong Kong came to occupy an important place in the global and regional economy, becoming a major trading and financial center, one of

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ments implementing the *gangrenzhigang* policy contemplate that a significant minority of the seats in the legislature, judiciary, and the senior ranks of the executive branch are to be occupied by people who hold foreign passports.

The terms that best suggest a distinct Hong Kong identity, tellingly, became fairly common usages only recently. They too may prove unsatisfactory. The English term, "Hong Konger," has the dysphonic clunk of a neologism. The Chinese *xianggangren* coexists uneasily with the more politically charged and much more prevalent *gangren*, and has the shortcoming of sounding in its Cantonese pronunciation very much like the English "Hong Kongian."

<sup>10</sup> See LAU & KUAN, *supra* note 1, at 178-87 (analyzing "Hong Kong" vs. "Chinese" identities in Hong Kong); see also Tu Wei-ming, *Cultural China: The Periphery as Center*, in *THE LIVING TREE: THE CHANGING MEANING OF BEING CHINESE TODAY* 1, 10-11, 15 (Tu Wei-ming ed., 1994) (describing the emergence of a Hong Kong Chinese cultural and political identity distinct from a mainland Chinese identity).

<sup>11</sup> See Lau Siu-kai, *Democratization and Decline of Trust in Public Institutions in Hong Kong*, 3 *DEMOCRATIZATION* 158, 166 (1996); Kuan Hsin-chi & Lau Siu-kai, *Mass Media and Politics in Hong Kong* 8-9 (Sept. 1988) (unpublished manuscript, on file with authors).

<sup>12</sup> See HONG KONG GOV'T INFO. SERVICES, *supra* note 3, at 48.

<sup>13</sup> See 2 *EUROPA WORLD Y.B.* 1996, at 3365, 3399 (1996).



the world's busiest ports, the gateway to China, and a shining example of the East Asian economic miracle. A growing sense of proprietary pride among the territory's residents in the considerable accomplishments of Hong Kong accompanied this rise to wealth and prominence. For many of its people, Hong Kong had begun to look and feel like a unique and attractive place with a distinctive and successful community.

The soaring levels of affluence and education that accompanied economic growth correlated with increased pressure for a democratic and accountable government. Facing such pressure and fearing that the riots that shook the territory in the 1960s indicated that the government was dangerously out of touch with popular concerns, the colonial authorities responded. They began to provide mechanisms for "consultation" with their subjects and for a modicum of democratization. The establishment of a new Urban Council, District Boards, and Regional Council between 1973 and 1986 put in place partially elected statutory consultative bodies.<sup>14</sup> A series of government Green Papers and White Papers during the 1980s pledged gradual progress toward democratic reforms in the process for selecting members of the Legislative Council ("Legco").<sup>15</sup>

During the final decade of colonial rule in Hong Kong, dramatic events accelerated the development of "mass" politics and pressures for public participation in government. The huge public demonstrations in Hong Kong in 1989, held in support of the student-led democracy movement in Beijing, and in outrage at its brutal suppression, showed clearly that "ordinary" Hong Kong

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<sup>14</sup> See *supra* note 6; MINERS, *supra* note 6, at 155-57, 169-74.

<sup>15</sup> See GOVERNMENT OF H.K., WHITE PAPER: THE DEVELOPMENT OF REPRESENTATIVE GOVERNMENT — THE WAY FORWARD (Feb. 1988) [hereinafter WHITE PAPER (Feb. 1988)]; GOVERNMENT OF H.K., GREEN PAPER: THE 1987 REVIEW OF DEVELOPMENTS IN REPRESENTATIVE GOVERNMENT (May 1987) [hereinafter GREEN PAPER (May 1987)]; GOVERNMENT OF H.K., WHITE PAPER: THE FURTHER DEVELOPMENT OF REPRESENTATIVE GOVERNMENT IN HONG KONG (Nov. 1984) [hereinafter WHITE PAPER (Nov. 1984)]; GOVERNMENT OF H.K., GREEN PAPER: THE FURTHER DEVELOPMENT OF REPRESENTATIVE GOVERNMENT IN HONG KONG (July 1984) [hereinafter GREEN PAPER (July 1984)]; LO SHUI-HING, THE POLITICS OF DEMOCRATIZATION IN HONG KONG 67-100 (1997); Norman J. Miners, *Moves Toward Representative Government 1984-1988*, in HONG KONG: THE CHALLENGE OF TRANSFORMATION, *supra* note 6, at 19-35; Lo Shui-hing, *Decolonization and Political Development in Hong Kong*, 18 ASIAN SURV. 18 (1988).

citizens could mobilize in support of political objectives.<sup>16</sup> Subsequent demonstrations, including the annual memorial gatherings on the anniversary of the Tiananmen Incident and rallies to protest P.R.C. and colonial government actions and policies, confirmed that the potential for politically motivated and politically potent action by Hong Kong citizens had to be taken seriously. To a considerable degree, Governor Patten's electoral reforms reflected a recognition of the potential power of popular political attitudes and mass political behavior during the waning days of colonial rule.

In addition to loosely structured popular activism and partly in response to the colonial government's constitutional reforms, Hong Kong, in the 1990s, produced a number of true electoral politicians who competed for newly elective positions in Legco and local government bodies. These politicians also comprised the leadership of newly established political parties.<sup>17</sup> While still a far cry from the big city pols that Governor Chris Patten encountered as a young man working on a campaign in the United States, or the colleagues he worked with as a Member of Parliament and as a Conservative Party leader in Britain,<sup>18</sup> these

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<sup>16</sup> Senior Executive Councillor Lydia Dunn commented in the wake of the post-Tiananmen demonstrations that "Hongkong [sic] people have been so enthusiastic to speak up in a responsible way that we can no longer say people here are not interested in politics or are politically immature." Emily Lau, *Voice of the People*, FAR E. ECON. REV., June 8, 1989, at 18. The head of the Chinese delegation to the Sino-British Joint Liaison Group, Ke Zaishuo, conceded that the Tiananmen Incident shook popular confidence in Hong Kong, but he argued that this reaction occurred only because the people in Hong Kong were ignorant of what had really happened in Beijing. See *Hong Kong: Ironing Out the Wrinkles in the Face of 1997*, S. CHINA MORNING POST, Oct. 1, 1989.

<sup>17</sup> See, e.g., Jane C.Y. Lee, *The 1997 Transition and Hong Kong's Evolving Political Leadership*, in ONE COUNTRY, MANY SYSTEMS 63-94 (Donald H. McMillen & Michael E. DeGloyer eds., 1993); Alvin S.Y. So, *The Tiananmen Incident, Patten's Electoral Reforms, and the Roots of Contested Democracy*, in THE CHALLENGES OF HONG KONG'S REINTEGRATION WITH CHINA, *supra* note 7, at 49-84; cf. LAU SIU-KAI, DECOLONIZATION WITHOUT INDEPENDENCE AND THE POVERTY OF POLITICAL LEADERS IN HONG KONG (1990) (describing pre-1990 absence of effective political leaders and strong mass party organizations).

<sup>18</sup> On Patten's earlier career and its implications for his approach to the governorship of Hong Kong, see, for example, JONATHAN DIMBLEBY, THE LAST GOVERNOR: CHRIS PATTEN AND THE HANDOVER OF HONG KONG 4-15 (1997); James Bartholomew and Stacy Mosher, *Last Viceroy*, FAR E. ECON. REV., May 7, 1992, at 15; Denis MacShane, *Governing Principles*, FAR E. ECON.

budding Hong Kong politicians nevertheless reflected and encouraged the territory's emergent popular politics. In a fashion familiar in democratic polities, these politicians articulated and pressed the colonial authorities to act on their constituents' preferences, and sometimes sought to shape those preferences. They used election campaigns, party organizations, floor debates in Legco, other operations of government, and the mass media to keep up a constant drumbeat of public discourse on issues of politics and policy.

The territory's "liberals" and "democrats" and Hong Kong's colonial government, itself a target of liberal and democratic criticism, did not monopolize Hong Kong's new popular politics. During the final decade of British rule, pro-China parties were established in the territory to battle pro-democracy and business-conservative parties in the elections mandated by late colonial reforms.<sup>19</sup> Politicians and officials of every ideological stripe claimed to speak for the people of Hong Kong and sought to win their support. In doing so, they drew on, and encouraged, a boom in public opinion research by Hong Kong media and academic institutions during the 1980s and 1990s, most of which focused on popular attitudes toward aspects of the 1997 question.<sup>20</sup>

In the 1980s and 1990s, Beijing appointed, directly or indirectly, dozens of Hong Kongers to represent the interests and preferences of Hong Kong in a succession of bodies charged with shaping the S.A.R.'s laws and institutions. These bodies included the Basic Law Drafting Committee, the Basic Law Consultative Committee, the Preliminary Working Committee ("P.W.C."), the Preparatory Committee ("P.C."), the Selection Committee for the Chief Executive (which also voted on the Provisional Legislature's membership), and the Provisional Legislature itself.<sup>21</sup> While the

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REV., May 7, 1992, at 31.

<sup>19</sup> See *supra* note 14-15 and accompanying text (describing late colonial reforms in Hong Kong).

<sup>20</sup> See, e.g., KUAN HSIN-CHI & LAU SIU-KAI, *POLITICAL ATTITUDES IN A CHANGING CONTEXT: THE CASE OF HONG KONG* (1997); LAU & KUAN, *supra* note 1; Robert T.Y. Chung, *Public Opinion in the Late Transition Period, in FROM COLONY TO SAR: HONG KONG'S CHALLENGES AHEAD*, *supra* note 6, at 491-526.

<sup>21</sup> See, e.g., Jacques deLisle & Kevin P. Lane, *Cooking the Rice Without Cooking the Goose: The Rule of Law, the Battle over Business and the Quest for Prosperity in Hong Kong after 1997*, in *HONG KONG UNDER CHINESE RULE*:

Hong Kong members of these bodies were mostly business elites and reliably "pro-China" types, the appointments were not limited to these circles and, in theory, represented all of the people of Hong Kong.

In addition to such new features on the territory's political landscape, established institutions also played a role in Hong Kong's newly dynamic and contentious public life. Officials of the colonial government continued to hold forth as interpreters of the people's wishes and guardians of their interests. A pro-China, left-wing press, dedicated to conveying the P.R.C.'s views to the masses, and a pro-China trade union had long been fixtures on the

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THE ECONOMIC AND POLITICAL IMPLICATIONS OF REVERSION 31, 39-40 (Warren I. Cohen & Li Zhao eds., 1997) (describing heavy representation of business among Beijing's informal advisers and on formal transition-related bodies); *China Names HK Transition Committee*, U.P.I., Dec. 28, 1995, available in LEXIS, Asiatic Library, Allasi File (describing the membership of the Preparatory Committee ("P.C.") as dominated by pro-China people and business leaders); Louise do Rosario, *Follow the Leader*, FAR E. ECON. REV., Feb. 23, 1995, at 18 (noting that the 37 Hong Kong members of the Preliminary Working Committee included business magnate Li Ka-shing, the head of the territory's largest pro-China labor union, a long-serving, and knighted, member of the territory's Executive Council, and some prominent solicitors); Bruce Gilley, *Down to Brass Tacks*, FAR E. ECON. REV., Jan. 25, 1996, at 14-15 (noting that nearly half of the 94 Hong Kong seats on the 150-member Preparatory Committee went to business people); *Incumbents and Legco Losers Win Selection Fight*, S. CHINA MORNING POST, Dec. 22, 1996, at 1 (describing the party affiliation and leanings of Provisional Legislature members); John Ridding, *China's HK Move Criticized by Patten*, US, FIN. TIMES (London), Dec. 23, 1996, at 4; Stephen Vines, *The Movers and Shakers*, ASIA TIMES, June 27, 1997, at 13 (describing the backgrounds of members of China's informal groups of Hong Kong advisers and of key formal transitional bodies); see also The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Apr. 4, 1990 (P.R.C.), translated in 29 I.L.M. 1520 [hereinafter Basic Law] annex I (mandating that members of the committee electing future Chief Executives be drawn in equal shares from (1) the industrial, commercial, and financial sectors, (2) the professions, (3) labor, social services, religious, and other sectors, and (4) political representatives from Hong Kong); *Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region* § 3 (1990), reprinted in *id.* [hereinafter N.P.C. Decision] (containing a similar provision concerning the composition of the selection committee that nominated the first Chief Executive and elected in the Provisional Legislature); Ming K. Chan, *Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law*, in THE HONG KONG BASIC LAW: BLUEPRINT FOR STABILITY AND PROSPERITY UNDER CHINESE SOVEREIGNTY? 7-8, 22-24 (Ming K. Chan & David J. Clark eds., 1990) (describing the mixed but heavily pro-business composition of the Basic Law Drafting Committee and, to a lesser degree, the Basic Law Consultative Committee).

Hong Kong political scene, and continued to be significant political forces during the run-up to reversion. Hong Kong's deputies to the National People's Congress ("N.P.C."), China's national legislature, and the Chinese People's Political Consultative Conference, China's principal United Front organ, provided at least a formal opportunity for popular representation of Hong Kongers alongside their compatriots and future fellow Chinese citizens in key P.R.C. bodies.<sup>22</sup>

The rise of more extensive political and institutional mechanisms for hearing, amplifying, and directing the voice of the Hong Kong people reflected a perception across the spectrum of political elites that the territory's ordinary citizens were no longer reliably apolitical. They had opinions about politics, which in transitional Hong Kong were primarily opinions about prospective laws and institutions for the S.A.R. Political elites recognized that these opinions, if not addressed and accommodated, might drive Hong Kong people to act in ways that could prove disastrous for Hong Kong's stability and, therefore, its prosperity.

All sides in the political debates over Hong Kong's future appeared to understand that disloyalty and exit were viable options available to much of the populace. Leading participants in the politics of the transition apprehended that popular discontent with an unpalatable S.A.R. order could lead to a sapping of Hong Kong's economic dynamism, eruptions of disorder, and, in turn, repressive crackdowns. While the broad masses had this disloyalty option, a more elite stratum of Hong Kongers had a genuine exit option because they held or could

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<sup>22</sup> See, e.g., XIANFA [Constitution] arts. 57-78 (P.R.C.) (defining the composition and powers of the National People's Congress; *id.* pmbl. (referring to the Chinese People's Political Consultative Conference ("C.P.P.C.C.")); Basic Law, *supra* note 21, art. 159 (conferring on Hong Kong N.P.C. representatives the power, with the concurrence of the S.A.R. legislature and Chief Executive, of proposing amendments to the Basic Law); *id.* annex I (declaring Hong Kong N.P.C. and C.P.P.C.C. members to be among the small pool from which one-fourth of the members of the election committee for future Chief Executives are to be selected); *N.P.C. Decision*, *supra* note 21, § 3 (containing a similar provision concerning the eligibility for membership in the selection committee that nominated the first Chief Executive and named the Provisional Legislature); see also Karin Chai, *The Politicization of Unions in Hong Kong*, in ONE COUNTRY MANY SYSTEMS *supra* note 17, at 121 (discussing the role of pro-China unions); Emily Lau, *The Press Gang*, FAR E. ECON. REV., Sept. 27, 1990, at 26 (describing the considerable circulation of strongly pro-China and left-wing newspapers in Hong Kong).

acquire foreign citizenship or residence rights.<sup>23</sup> Key political players appreciated that legal and institutional arrangements unsatisfactory to this vital group might trigger an exodus that would devastate the territory's human capital, social stability, and allure for international business.<sup>24</sup> On the other hand, the principal participants in the political conflicts of the endgame also seemed to discern the increased benefits of mobilizing popular opinion in transitional Hong Kong. Properly channeled or carefully cultivated public opinion and pressure appeared to offer a formidable weapon in the endgame battles to shape laws and institutions for the S.A.R.

Recognizing the dangers and opportunities presented by a populace that identified with Hong Kong and that cared about and could affect the territory's legal and political future, Hong Kong's colonial rulers, the P.R.C., and the territory's "pro-democracy" and "pro-China" political leadership undertook considerable efforts to assert and to cultivate popular backing for their preferred packages of laws and institutions for the S.A.R. In the final years before reversion, the British and Hong Kong liberal side argued that the people of Hong Kong did, should, or must endorse a set of rule-of-law values and specific legal and institutional arrangements that satisfied at least the minimum requirements for a just order, defined in broadly liberal-democratic terms. China and its Hong Kong allies responded in kind. They asserted that the Hong Kong people did, should, or must embrace a set of rule-of-law values and concrete resolutions of the controversies of the endgame that were compatible with China's positivist conception of an acceptable legal and institutional order for the

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<sup>23</sup> See Emily Lau, *Elites Take All*, FAR E. ECON. REV., Apr. 19, 1990, at 18-19.

<sup>24</sup> By most estimates, at least several hundred thousand, probably in excess of 10%, of Hong Kong's population of six million hold foreign passports. See Bruce Gilley, *Red Flag over Hong Kong*, FAR E. ECON. REV., Dec. 7, 1995, at 72, 76 (stating that 12% of Hong Kong residents possess foreign passports). This figure, however, surely understates the exit option. Tens of thousands more have emigrated and not returned. In addition, many still in the territory without foreign passports have the right of abode elsewhere or could acquire it. See Louise do Rosario, *Passport Politics*, FAR E. ECON. REV., Sept. 29, 1994, at 18, 20 (reporting that while 400,000 Hong Kong residents hold foreign passports, many others have emigration rights). Twenty-two percent of respondents to a July 1995 poll indicated that they planned to leave Hong Kong. See Stephen Vines, *Sticky Chinese Fingers Close to the Honey Pot*, INDEPENDENT (London), July 1, 1995, Comment, at 17.

S.A.R.

### 2.1.2. *Contradictions Among the Hong Kong People*

The "Hong Kong people" were not nearly as monolithic as the label and the rhetoric tended to suggest. In the political lexicon of contemporary Hong Kong, the term has tended to exclude expatriate Westerners and those ethnic Chinese who ranked among the top elite of the territory's business community. Even so narrowed, however, the group was hardly homogenous. Although overwhelmingly ethnically Chinese and Cantonese-speaking, the Hong Kong people also included thousands of South Asians and a well-educated segment of the Chinese population comfortable in English. The Hong Kong people encompassed both recent migrants who had spent most of their lives in China, and local residents who were born in Hong Kong, some of them members of families that had been in the territory for generations.<sup>25</sup>

At one extreme, the Hong Kong people included illiterate peasants from the Guangdong countryside and the farmers of the New Territories' remaining tradition-steeped villages.<sup>26</sup> At the other extreme, the label applied to cosmopolitan professionals whose education included degrees from Western or Western-style universities and whose work, or quests for foreign passports, had taken them abroad for substantial periods. In between, there were

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<sup>25</sup> See HONG KONG GOV'T INFO. SERVICES, *supra* note 3, at 157-58, 467 (providing statistics on English language tertiary education in Hong Kong and students going abroad to study); *id.* at 339-43 (describing the ethnic and cultural composition of the Hong Kong population); LAU, *supra* note 4, at 175-76 (contrasting recent immigrants and old "Hong Kong families"); Skelton, *supra* note 4 (analyzing the origins, destinations, and socioeconomic characteristics of Hong Kong emigrants and immigrants).

<sup>26</sup> According to one mainstream academic estimate, roughly 10% of Hong Kong's potential electorate was illiterate at the time of the final colonial era elections. See *Hong Kong: Mother and Father Do Not Know Best*, ECONOMIST, Sept. 23, 1995, at 29 (quoting Michael deGloyer of Hong Kong Baptist University). The colonial government's long-standing accommodation of traditional inheritance and family laws reflected the "tradition-steeped" quality of the rural New Territories. See Louise do Rosario, *Gender Wars*, FAR E. ECON. REV., Apr. 7, 1994, at 21 (describing Legco member Christine Loh's efforts to secure repeal of an inheritance law that entrenched a traditional rural area prohibition on women inheriting land); see also PETER WESLEY-SMITH, *THE SOURCES OF HONG KONG LAW* 205-24 (1994) (describing Chinese law and Chinese custom as a source of Hong Kong law, particularly in the New Territories).

hundreds of thousands of factory workers whose jobs were increasingly threatened by the manufacturing industry's migration to the mainland, and office workers whose livelihoods depended on servicing the local, mainland, or global economies.<sup>27</sup>

With such social and economic diversity came considerable disparities in wealth. Hong Kong's developed-world level of per capita income was less evenly distributed than in most industrialized countries.<sup>28</sup> Thus, the Hong Kong people included vast middle and working classes, a group of desperately poor who lived on the streets or, quite literally, in cages, and elite professionals who paid rents that could shock Manhattanites. Socioeconomic class distinctions also coincided with one of the most politically salient fault lines dividing the Hong Kong people during the endgame: successful businesspeople, professionals, and relatively senior civil servants constituted the vast majority of the estimated ten to twelve percent of Hong Kongers who held foreign passports or rights of abode.<sup>29</sup>

As Hong Kong entered the final years of its protracted transition to Chinese rule, the discernible political leanings of the people of Hong Kong ranged widely. Official P.R.C., broader pro-China, colonial government, and Hong Kong liberal views all seemed certain to resonate in some quarters in Hong Kong. Many Hong Kongers who had fled political repression or chaos on the mainland held strongly anti-communist views and deeply distrust-

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<sup>27</sup> See *supra* note 25; see also HONG KONG GOV'T INFO. SERVICES, *supra* note 3, at 49-62, 79-81, 93-97, 116-17 (describing the sectoral composition of the economy, employment, and foreign trade and investment); Leonard K. Cheng, *Trade and Industry: 1997 and Beyond*, in FROM COLONY TO SAR: HONG KONG'S CHALLENGES AHEAD, *supra* note 6, at 175-96 (describing trends in the sectoral composition of the economy and trade); Jacques deLisle, *Political Alchemy, the Long Transition and Law's Promised Empire: How July 1, 1997, Matters — and Doesn't Matter — in Hong Kong's Return to Chinese Rule*, 18 U. PA. J. INT'L ECON. L. 69, 91-96 (1997) (assessing the implications of pre-reversion economic integration of Hong Kong with China).

<sup>28</sup> See, e.g., Tang Shu-hung, *The Economy*, in FROM COLONY TO SAR: HONG KONG'S CHALLENGES AHEAD, *supra* note 6, at 117, 138-42 (finding the inequality of income distribution in Hong Kong to have risen in the 1970s and early 1980s, reaching a Gini Coefficient of .48 in 1991, indicating the least equal income distribution among the newly industrialized economies of East Asia); LAU, *supra* note 4, at 176-180 (describing income inequality and its social and political consequences).

<sup>29</sup> See, e.g., Lau, *supra* note 23, at 18-19 (describing the British plan for offering citizenship to some of Hong Kong's elite); see also *supra* note 24 and accompanying text (discussing the "exit" option).



ed the regime that ruled across the soon-to-disappear border. Other residents, especially, but not exclusively, those who formed the territory's "pro-China" left, held political views that were strongly nationalist and reunificationist. Other versions of nationalism with substantial appeal were more anti-colonialist than pro-P.R.C., and some were openly supportive of the Guomindang, the ruling party in Taiwan that the Chinese Communist Party had driven from the mainland in 1949.<sup>30</sup> In addition, notions that Hong Kongers did or should have rights to some form of self-determination, and even a degree of nostalgia for fading colonial rule, found some adherents among the Hong Kong people on the eve of reversion.

Political issues and orientations less intimately linked to questions of national identity also varied considerably in Hong Kong at the twilight of colonial rule. In addition to orthodox Chinese communist doctrines, conventional liberalism, social welfarism, conservative corporatism, "Asian values"-tinged developmentalism, and laissez-faire libertarianism attracted followers in some segments of Hong Kong society. The diversity in the political perspectives, social and economic status, ethnic and cultural backgrounds, life experiences, and even citizenship among the Hong Kong people portended conflicting views on the rule-of-law questions facing pre-reversion Hong Kong, and differing degrees of vulnerability to persuasion or pressure to accept any particular answers to those questions. All sides in the political conflicts over those issues thus seemed potentially able to find natural and reliable supporters in some segment of the Hong Kong public.

On the other hand, the historically weak sense of a Hong Kong identity, Hong Kongers' limited experience with participa-

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<sup>30</sup> See generally, KUAN & LAU, *supra* note 20 (finding variety and change in attitudes toward politics, government, and the "existing system"); MINERS, *supra* note 6, at 196-202 (describing political parties' and leaders' platforms and the constituencies that support them); Chai, *supra* note 22, at 121 (discussing political orientations of Hong Kong workers); So, *supra* note 17, at 49, 58-61, 68-72 (describing the formation of grass-roots support for diverse political parties and agendas); Louise do Rosario, *Grassroots Movement*, FAR E. ECON. REV., Aug. 18, 1994, at 20 (describing "United Ants," a small group pressing for uncompromisingly liberal reforms, including selection of all Legco members by universal suffrage direct elections); Emily Lau, *The Press Gang*, FAR E. ECON. REV., Sept. 27, 1990, at 26 (describing considerable circulation of strongly pro-China and left-wing newspapers in Hong Kong).

tion in the territory's politics and governance, and the apparent variety and fragmentation of residents' attitudes toward government institutions and laws that were themselves in a state of flux, suggested that the Hong Kong people's views on current issues remained murky, volatile, and malleable. Attempts to predict, mold, or merely plumb the depths of popular opinion thus appeared likely to be worthwhile for key political participants in the final battles over the rule of law and legal and institutional arrangements for the S.A.R. Not surprisingly in these circumstances, members of both sides in the political struggle over popular rule-of-law values and specific laws and institutions worked diligently to claim popular backing and were able to do so with some credibility.

Still, these battles almost never explicitly recognized the numerous fault lines that seemingly divided the people whose allegiance or acquiescence the political players sought. The arguments and assertions on both sides of the basic political divide remained cast in terms of a single mandate from a monolithic Hong Kong people. This striking, albeit implicit, rejection of conventional coalition-building politics underscores that the fundamental clash of visions of the rule of law and the nature of the sovereign's domestic authority overshadowed and shaped the ordinary politics of pursuing public support.

## 2.2. *The Hong Kong People and the British and Hong Kong Liberal-Democratic Vision of the Rule of Law*

Throughout much of the final decade preceding Hong Kong's reversion, officials of the Hong Kong and British governments, and leaders of Hong Kong's "pro-democracy" parties and a broader "liberal" political movement argued that the territory's residents required that the rule of law be preserved. They asserted that the continuation of Hong Kong's rule of law was an issue "of greatest concern to Hong Kong people."<sup>31</sup> Indeed, the Hong Kong people regarded the rule of law as one of the truly definitive traits of Hong Kong that "distinguished Hong Kong from all other Asian societies."<sup>32</sup> In his final annual policy address,

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<sup>31</sup> Fung Wai-kong & Louis Won, *Patten Blasts Beijing Plan on Legislature*, S. CHINA MORNING POST, Oct. 3, 1996, at 1 (quoting Martin Lee).

<sup>32</sup> Martin Lee, *Need for "Rule of Law,"* S. CHINA MORNING POST, Aug. 1, 1993, at 11.

Governor Patten asserted that the "peace and safety guaranteed by the rule of law" had prompted much of Hong Kong's population to flee to the territory from China.<sup>33</sup> Democratic Party leader and Legislative Councillor Martin Lee claimed that numerous reforms that had enhanced the rule of law in the 1990s reflected the demands of the people of Hong Kong and their elected representatives in the legislature.<sup>34</sup>

Adherents to this perspective on Hong Kong's rule of law argued that even if some or most of the people did not yet appreciate it, their interests depended on the rule of law. Governor Patten urged people to "stand up for the defence of their rights" lest they be trampled upon.<sup>35</sup> Similarly, Martin Lee warned, "It is important that all Hong Kong people stand up to make sure our rule of law is maintained," or else China's prosecution and jailing of dissidents, such as Wei Jingsheng, will be the "kind of thing that will happen in Hong Kong" after reversion.<sup>36</sup>

Proponents of this line of argument added that failure to assure that Hong Kong's rule of law survived the transition would lead to serious instability. They found support for this view in the fact that hundreds of thousands of the territory's people had turned out for street demonstrations after the Tiananmen Incident, in part because Hong Kongers feared that the suppression of the democracy movement in China portended a breach of China's promises to preserve Hong Kong's rule of law and key laws and institutions after reversion.<sup>37</sup> They found additional evidence for this characterization of the people's values in polls

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<sup>33</sup> Peter Humphrey, *Patten Swansong Defends HK Democracy, Rights*, Reuters, Oct. 2, 1996, available in LEXIS, Asiapc Library, Allasi File.

<sup>34</sup> See *A-G Rejects Attack on Rule of Law*, S. CHINA MORNING POST, July 13, 1995, at 5.

<sup>35</sup> Jonathan Mirsky, *Firms "Must Give Something Back" to Hong Kong*, TIMES (London), Apr. 29, 1996, at 11.

<sup>36</sup> Peter Lim, *Hong Kong Faces New Uncertainty After Wei's Sentencing*, Agence France Presse, Dec. 17, 1995, available in LEXIS, Asiapc Library, Allasi File.

<sup>37</sup> On the impact of the Tiananmen Incident on Hong Kong politics and attitudes toward a future under Chinese rule, see, for example, STEVE TSANG, *HONG KONG: AN APPOINTMENT WITH CHINA* 156-80 (1997); Frank Ching, *Toward Colonial Sunset: The Wilson Regime, 1987-92*, in *PRECARIOUS BALANCE: HONG KONG BETWEEN CHINA AND BRITAIN, 1842-1992*, *supra* note 8, at 178-82; So, *supra* note 17, at 49.

that showed flagging popular confidence in the territory's future, and spikes in the rate of emigration and requests for right of abode that accompanied a number of later shocks that seemed threatening to a generally liberal rule of law for a P.R.C.-ruled Hong Kong.<sup>38</sup>

Although they disagreed about some of the specifics of a rule-of-law regime that would meet the needs of the people, the members of the loosely knit camp of Hong Kong politicians and British and colonial officials all envisioned a distinctly liberal and democratic version of the rule of law. They agreed that the people required preservation of the common law system, as the Joint Declaration on the Question of Hong Kong<sup>39</sup> ("Joint Declaration") and the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law") recognized.<sup>40</sup> They also agreed that a rule of law adequate and acceptable for the people of Hong Kong entailed an independent judiciary and a non-corrupt and legally accountable executive to administer the laws. Governor Patten articulated this perspective, arguing that a "clean, accountable government under the rule of law" was among the virtues of Hong Kong that its people could be expected to defend.<sup>41</sup> Martin Lee offered another formulation of the same basic idea: "In Hong Kong, when we think about the rule of law, key principles come to mind: clear rules that citizens can follow; a judiciary free from political influence; the right to sue the Government; . . . and a court system that will allow justice to be done . . . ."<sup>42</sup> The Hong

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<sup>38</sup> See Bruce Gilley, *Darkness Dawns*, FAR E. ECON. REV., Apr. 11, 1996, at 14; Vines, *supra* note 24.

<sup>39</sup> The Joint Declaration on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 1985 Gr. Brit. T.S. No. 26 (Cmd. 9543) [hereinafter Joint Declaration].

<sup>40</sup> See *infra* Sections 2.2, 2.3; Joint Declaration, *supra* note 39, art. 3(3), annex I, II; Basic Law, *supra* note 21, arts. 8, 84, 160.

<sup>41</sup> Fung Wai-kong, *Patten Pushes Open Selection*, S. CHINA MORNING POST, July 29, 1996, at 4 (citing Governor Patten's belief that a clean, accountable government under the rule of law and institutions that checked corruption were keys to Hong Kong's success, and were virtues the Hong Kong people should support); see also Bruce Einhorn, *The Jitters Just Got Worse*, BUS. WK., Feb. 3, 1997, at 26 (noting the importance of an honest civil service and political freedoms to Hong Kong).

<sup>42</sup> Lee, *supra* note 32, at 11; see also Margaret Ng, *Lead Us to Transparency*, S. CHINA MORNING POST, Feb. 14, 1997, at 17 (noting the importance of clear and stable laws and guarantees of judicial independence).

Kong Bar Association made a similar point in a letter to the Chief Executive-designate:

The rule of law does not merely mean that there is a body of law by which the people will be ruled. . . . The rule of law also means the process of making and repealing law is open, reasoned and in accordance with the law. If not, . . . it will become rule by the people in power.<sup>43</sup>

The British colonial authorities at times suggested that the rule of law also required that the laws reflect the will of the people, as expressed through institutions politically accountable to the people. Governor Patten, for example, argued early in his tenure that Hong Kong needed "a government which was accountable to a broadly based legislature," and needed a legislature with sufficient democratic legitimacy to be able to "hold the executive to account in a responsible and effective way" and to "help secure Hong Kong's way of life," including its rule of law.<sup>44</sup>

Some democratic politicians in Hong Kong asserted an even tighter and clearer link between the rule of law that the people of Hong Kong wanted and needed and the development of democratic institutions. As Martin Lee saw it, "Hong Kong has managed to uphold the rule of law . . . solely because . . . a democratically elected British parliament has guaranteed our rule of law." The rule of law's continuation beyond 1997 required "the introduction and institutionalisation of democratic and accountable government" that would be elected by and "answerable to the people of Hong Kong."<sup>45</sup>

In mid-1996, a new political grouping of prominent pro-democracy legislators and activists took the argument a step further. One of its leaders suggested that a rule of law adequate for the people of Hong Kong additionally required that the people of Hong Kong be allowed to draft their own constitution to replace the faulty and P.R.C.-imposed Basic Law.<sup>46</sup> As many of these

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<sup>43</sup> Philip Stephens, *One System Fits All*, FIN. TIMES (London), Jan. 31, 1997, at 14.

<sup>44</sup> *A Different Style*, FAR E. ECON. REV., Oct. 22, 1992, at 22.

<sup>45</sup> Lee, *supra* note 32, at 11.

<sup>46</sup> See *Lawmakers Create Pro-Democracy Group*, ASIAN WALL ST. J., Aug. 27, 1996, at 7.

comments linking the provision of an adequate rule of law to electoral democracy or a strong judiciary or continuity in specific laws suggest, liberal-democratic attempts to describe or to shape the rule-of-law values held by the Hong Kong people were closely entangled with the specific legal and institutional questions that dominated Hong Kong politics in the 1990s.

2.2.1. *The Bill of Rights Ordinance and the Rights of the Hong Kong People*

Popular support for the Bill of Rights Ordinance ("Ordinance" or "Bill of Rights") was taken virtually for granted when the colonial government moved to adopt the Ordinance at the turn of the decade.<sup>47</sup> After all, the events at Tiananmen in 1989 had deeply shaken Hong Kongers' confidence that their accustomed liberties would survive the transition to Chinese rule.<sup>48</sup> A large portion of the territory's population had taken to the streets to say as much in the wake of the crackdown on China's democracy movement. With the people's preferences thus presumed and demonstrated, proponents of the Ordinance appeared to need to do little in asserting or cultivating popular support.

The colonial authorities' and Hong Kong politicians' efforts to claim and to cultivate popular support for the Ordinance, and for the protection of civil and political liberties more generally, became more elaborate in the middle of the 1990s. As Hong Kong politics became more democratic and more volatile and the P.R.C.'s threats to excise portions of the Ordinance and related reforms grew more strident, British colonial officials and Hong Kong's democratic politicians responded with stronger and more complex arguments that the people of Hong Kong did, would, or should demand the preservation of the Bill of Rights and other liberty-protecting laws.

The British colonial and Hong Kong liberal side's principal argument was, simply, that the people of Hong Kong strongly supported the threatened laws, and that a roll-back therefore would undermine Hong Kongers' confidence, alienate them from

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<sup>47</sup> Bill of Rights Ordinance, Cap. 383 (1991). For discussions of the context of the Ordinance's preparation and adoption, see, e.g., MINERS, *supra* note 6, at 27-28; Emily Lau, *Better Late than Never*, FAR E. ECON. REV., July 12, 1990; Emily Lau, *Confidence Building*, FAR E. ECON. REV., Oct. 26, 1989, at 19.

<sup>48</sup> See *supra* note 47; *supra* note 37.

the new regime, and harm Hong Kong. Martin Lee asserted, "Hong Kong's 6 million citizens cherish their civil liberties" and "recognize that the difference in approach to human rights" in Hong Kong and in China "will pose the greatest threat to Hong Kong in the transition to Chinese sovereignty."<sup>49</sup> When China's hand-picked Preparatory Committee's legal subgroup announced its final proposals to revise the Ordinance and to overturn liberal amendments to laws restricting freedom of association and assembly, Governor Patten denounced the recommendation as a step that "deprives" the S.A.R. of "public confidence."<sup>50</sup> Patten argued, "It is already crystal clear that what the community wants to see is the preservation of Hong Kong's current civil liberties."<sup>51</sup> Independent, pro-democracy legislator Emily Lau made a similar claim: "Hong Kong people want their lifestyle to remain unchanged," and the threat to water down the Bill of Rights and reverse rights-expanding amendments to colonial laws "shattered" that "dream."<sup>52</sup> "[T]he general consensus of the community is that we want to see human rights protections entrenched in our laws."<sup>53</sup> Lau's colleague Christine Loh added, "[P]eople here are not following Beijing's line on the Bill of Rights."<sup>54</sup> According to a leader of the Alliance in Support of the Patriotic, Democratic Movement in China, the "people of Hong Kong worry the Chinese government will apply the concept of mainland laws

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<sup>49</sup> Martin Lee, *Beijing's Tiananmen Mentality Augurs Most Ill for Hong Kong*, INT'L HERALD TRIB., June 23, 1994.

<sup>50</sup> Patten also described the recommendations as "ridiculous in legal principle." *If the British Side Knew This Would Happen, It Should Not Have Done It in the Beginning*, WEN WEI PO, Jan. 22, 1997, at A2.

<sup>51</sup> Peter Humphrey, *China Presses on with Curbs on HK Freedoms*, Reuters, Feb. 24, 1997, available in LEXIS, Asiapc Library, Allasi File. Characteristically, U.K. Foreign Secretary Rifkind took a more accommodating line with China, hoping that his Chinese counterpart Qian Qichen's consultations with the people of Hong Kong would "reduce the damage caused by the repealing of these ordinances." Greg Torode & Duncan Hughes, *Qian Sticks to His Guns in Final Meeting with Rifkind*, S. CHINA MORNING POST, Feb. 15, 1997, at 1.

<sup>52</sup> Alison Leung, *China-Picked Committee on HK To Wind Up Tenure*, Reuters, Dec. 7, 1995, available in LEXIS, Asiapc Library, Allasi File.

<sup>53</sup> Emily Lau, *Letter to Hong Kong* (Hong Kong radio broadcast, Feb. 2, 1997), transcribed in BBC Summary of World Broadcasts, Feb. 4, 1997, available in LEXIS, Asiapc Library, Allasi File.

<sup>54</sup> Christine Loh, *The Means To Clamp Down on Free Speech*, S. CHINA MORNING POST, Nov. 20, 1995, at 22 (commenting on P.W.C. recommendations to roll back rights laws).

regarding treason and subversion after 1997<sup>55</sup> — a concept that was foreign to existing Hong Kong law.

Even a conservative Legco member who sided with China on many issues commented that “the common people here have accepted the Bill of Rights” and would see its repeal as a dangerous stripping-away of “protec[tion] from government abuses.”<sup>56</sup> Presumably for similar reasons, a leader of the territory’s leading pro-China party reportedly urged China not to undercut the Bill of Rights.<sup>57</sup> The argument that the people were deeply committed to the Bill of Rights and related legal reforms drew additional support from opinion polls that found civil liberties to be high on the list of popular concerns on the eve of reversion.<sup>58</sup> A 1996 survey, for example, reported that respondents rated preservation of free speech and a free press as the most important tasks for the head of the S.A.R. government.<sup>59</sup> Another survey showed Chief Executive-designate Tung Chee-hwa’s popularity dropping precipitously in the wake of his announced support for the Preparatory Committee’s plan to reject parts of the Bill of Rights, Public Order, and Societies Ordinances.<sup>60</sup> Moreover, liberal commentary suggested that favorable poll numbers understated popular support: a “silent majority” backed the Bill of Rights and rights-protecting legislation, but was understandably reluctant to express its views on politically sensitive issues of laws that China had placed on the chopping block.<sup>61</sup>

Some critics of the planned retrenchments warned that the true views of the Hong Kong people ultimately would surface,

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<sup>55</sup> *Chinese, British Officials in Verbal Sniping in New HK Dispute*, Agence France Presse, Nov. 27, 1996, available in LEXIS, Asiapc Library, Allasi File (quoting Cheung Man-kwong).

<sup>56</sup> Bruce Gilley, *Hold Your Ground*, FAR E. ECON. REV., Nov. 16, 1995, at 36 (quoting Liberal Party leader and Legco member Allen Lee).

<sup>57</sup> See Gilley, *supra* note 24, at 76 (quoting Democratic Alliance for the Betterment of Hong Kong (“D.A.B.”) leader Tsang Yok-sing).

<sup>58</sup> See *Rule of Law, Autonomy Top Post-97 List, Survey Shows*, S. CHINA MORNING POST, Oct. 28, 1996, at 5. The principal controversial laws, aside from the Bill of Rights itself, were the Societies Ordinance, Cap. 151 (1992) and the Public Order Ordinance, Cap. 245 (1995).

<sup>59</sup> See Bruce Gilley, *Man on the Spot*, FAR E. ECON. REV., Dec. 19, 1996, at 15.

<sup>60</sup> See Ng, *supra* note 42, at 17.

<sup>61</sup> See Fanny Wong, *A Flawed Argument for Legal Changes*, S. CHINA MORNING POST, Jan. 29, 1997, at 14.



and that the Hong Kong people would surely make a decision to alter the laws a costly one. Financial Secretary Donald Tsang cautioned that China's and its allies' failure to "convince the people of Hong Kong" that there were good reasons for diluting rights-protecting laws would bring street protests, resignations from the civil service, and increased emigration.<sup>62</sup> Pro-democracy legislator Emily Lau and the liberal newspaper *Sing Tao Daily*, respectively, predicted that moves to cut back on legal protections for citizens' rights would "backfire and stir up resentment"<sup>63</sup> and would "cause 'panic among Hong Kong people.'"<sup>64</sup> In a somewhat less confrontational vein, Governor Patten warned that attempts to "slap down on people's freedoms in the name of greater stability" risked "produc[ing] exactly the political problems" of discontent and disorder that the moves to retrench liberties ostensibly sought to avoid.<sup>65</sup>

Government officials' and liberal politicians' arguments that the Hong Kong people supported the Bill of Rights and related reforms and that they would react badly to their reversal were not simply claims about the established preferences and values of the territory's residents. The governor's and Legco members' soaring rhetoric about Hong Kongers' love of rights and liberties sought to persuade the people, as well as to describe them. The broadly liberal camp's rather defensive invocation of the views of a "silent majority" suggested a perception that such persuasion might be necessary. The assertion that a roll-back of rights laws would trigger social unrest also seemed to be something more than a straightforward prediction or even a warning to China and its allies. Although the argument was not as explicit as similar ones made with respect to other issues of the endgame, the dire

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<sup>62</sup> See Chris Yeung, *Tsang Warns on Law Changes*, S. CHINA MORNING POST, Jan. 23, 1997, at 1.

<sup>63</sup> Peter Lim, *China To Forge Ahead with Diluted Rights Laws for Hong Kong*, Agence France Presse, Feb. 2, 1997, available in LEXIS, Asiapc Library, Allasi File.

<sup>64</sup> *China Hits Out at Patten Criticism over Human Rights Laws*, Agence France Presse, Jan. 21, 1997, available in LEXIS, Asiapc Library, Allasi File; see also Michael Binyon, *Hong Kong Leader Prepared To Head Street Protests*, TIMES (London), Feb. 22, 1997, at 16 (describing Hong Kong Democrats' pledge to lead street protests in opposition to China's plans to alter the Bill of Rights and reestablish restrictive colonial laws).

<sup>65</sup> Jonathan Sprague, *Future HK Government Blasted over Freedom Curbs*, Reuters, Apr. 10, 1997, available in LEXIS, Asiapc Library, Allasi File.

prognostications here too appeared designed to tap into the Hong Kong people's presumed fear of instability and uncertainty as a source of support for the liberal or pro-democracy position on rights legislation. The calculation appears to have been that residents who might be relatively unconcerned with liberal rights might support laws protecting those rights if they were convinced that gutting those laws would lead to social and economic disruption.

Other arguments from colonial authorities and pro-democracy politicians seemed to reflect a more affirmative dimension of a strategy to cultivate popular support for rights laws by asserting connections to other values thought to be important to the people. Most notably, these arguments sought to link the issue of the rights legislation's fate to questions of democracy and local autonomy for Hong Kong. Liberal political leaders and the governor argued that the roll-back that China and the S.A.R. government-in-waiting were planning could not plausibly represent the will of the Hong Kong people. According to this line of argument, a Legco that included democratically elected representatives of the people had passed the endangered laws.<sup>66</sup> But unelected bodies that included non-Hong Kong residents, such as the Preliminary Working Committee and the Preparatory Committee, had called for the reversal of the laws. An unelected "rubber-stamp" Provisional Legislature created by the P.R.C.-controlled Preparatory Committee, and chosen by an equally illegitimate and undemocratic Selection Committee, would complete the process by enacting new, more restrictive laws.<sup>67</sup> Moreover, the N.P.C. — a Beijing body with minimal membership from Hong Kong — had cleared the ground for the the Provisional Legislature's action when it approved the Preparatory Committee's recommendations on striking key rights legislation. The N.P.C., Governor Patten argued, "appl[ie]d a rubber stamp behind closed doors" and showed itself to be "deaf to the almost

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<sup>66</sup> See *infra* Section 2.2.2. (discussing the democratic pedigree of the 1991-elected legislature that passed the laws).

<sup>67</sup> See, e.g., Martin Lee, *Selling an Unconsulted Future Hong Kong in America*, INT'L HERALD TRIB., Mar. 28, 1995 [hereinafter Lee, *Selling an Unconsulted Future Hong Kong in America*]; Martin Lee, *Why the PWC Failed*, S. CHINA MORNING POST, Dec. 10, 1995, at 10 [hereinafter Lee, *Why the PWC Failed*]; Ng, *supra* note 42, at 17 (presenting comments of an independent Legco member who frequently sides with Democrats).

unanimous voice of the people of Hong Kong.”<sup>68</sup> In the same spirit, a Democratic Party spokesperson commented that the series of actions against the rights laws showed that China was “not going to respect the will of [the] Hong Kong people.”<sup>69</sup> These arguments strongly suggested that the people had reason to fear rolling back of rights laws because such moves portended a broader disregard of Hong Kongers’ wishes and concerns.

Finally, in seeking to cultivate popular support for late colonial rights laws, Hong Kong government officials and pro-democracy politicians also made arguments that returned in part to their shared notions of the substantive requirements of a just and proper legal order. Thus, liberal and democratic voices charged that, as both a normative and a descriptive matter, revising the Bill of Rights and reinstating restrictions on civil and political liberties would constitute, simply, an inexcusable betrayal of the people of Hong Kong. Those Hong Kong pro-China or conservative political leaders who were prepared to endorse or facilitate the roll-backs would breach a “solemn responsibility” to the people to protect their way of life and to maintain promised and desired continuity of laws that committed the sovereign to protecting key human rights.<sup>70</sup> As a spokesperson for Governor Patten articulated the point:

The community will have to decide whether Mr. Tung [Chee-hwa, the future Chief Executive who would preside over the enactment of new rights laws] . . . has answered the central question: Are Hong Kong’s freedoms and civil liberties after June 30 going to be the same or not? . . . If they aren’t, the community is entitled to know how the laws are going to be — and how they can conceivably be — consistent with the Joint Declaration, the Basic Law, and the two international covenants on human rights.<sup>71</sup>

When the N.P.C. acted to accept the Preparatory Committee’s

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<sup>68</sup> Fung Wai-kong, *Patten Fears for Freedom*, S. CHINA MORNING POST, Feb. 25, 1997, at 4.

<sup>69</sup> Humphrey, *supra* note 51.

<sup>70</sup> See, e.g., Lee, *Why the PWC Failed*, *supra* note 67, at 10.

<sup>71</sup> Linda Choy & Chris Yeung, *Tight Police Controls on Protests*, S. CHINA MORNING POST, Jan. 24, 1997, at 1.

recommendations to reject portions of the Bill of Rights and other laws, Governor Patten similarly derided the action as incompatible with "the legitimate needs and expectations of a modern, open society," the Hong Kong community's desires, and "the promises made in the Joint Declaration and . . . Basic Law."<sup>72</sup>

Liberal and pro-democracy forces argued that, faced with such threats to their liberties and disregard for their rightful expectations, the people of Hong Kong should act to prevent that betrayal and to defend the besieged laws that protected their rights and served their needs, despite their possible reluctance to do so. Independent pro-democracy Legco member Christine Loh argued that "Hong Kong people owe it to themselves" to take up the challenge and "make it clear to Beijing that Hong Kong wants to keep its Bill of Rights without it being watered down."<sup>73</sup> While these arguments still made claims about popular attitudes, their language of betrayal and moral obligation, and their hints of concern that the people might not respond as hoped, marked them as a blend of claims of appeals to principle and pragmatism that is qualitatively different from simple assertions about Hong Kongers' established views or predictions of Hong Kongers' likely actions.

### 2.2.2. *Democratic Reforms and the Will of the People*

The conflicts over the Hong Kong government's moves in the 1990s to introduce democratic reforms, particularly in laws governing elections for the Legislative Council, produced the most intense and sustained of the battles over "the people" during the endgame. This was to be expected. After all, the laws and policies for which the people's support was asserted or sought were ones that would structure the institutions charged with representing the will and interests of the people.

Much of the foundation for laying claim to popular backing for Governor Patten's admittedly modest democratic reforms for Legco was in place before he presented the outlines of his package in 1992.<sup>74</sup> The 1980s series of Green Papers and White Papers on

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<sup>72</sup> Fung, *supra* note 68, at 4.

<sup>73</sup> Loh, *supra* note 54, at 22.

<sup>74</sup> See Lo Chi-kin, *From Through Train to Second Stove*, in FROM COLONY TO SAR: HONG KONG'S CHALLENGES AHEAD, *supra* note 6, at 25-30; Frank Ching, *Cleared for Action*, FAR E. ECON. REV., Oct. 22, 1992, at 20-22

the development of representative government in Hong Kong<sup>75</sup> had put the issue of democratization onto the agenda of Hong Kong politics and into the minds of the territory's prospective electorate. In the late 1980s, the widely publicized drafts and final texts of the Basic Law included extensive provisions promising the gradual implementation of democratic elections for all seats in the S.A.R. legislature.<sup>76</sup> In addition, modest institutional reforms in the 1970s and 1980s had given the people of Hong Kong a little experience with electoral democracy through the introduction of partially elected local consultative bodies and, as of 1985, indirect elections for a small number of Legco seats.<sup>77</sup>

By the middle to late 1980s, there were strong indications of support among the Hong Kong people for extending democracy. Indeed, to defend the slow pace of change advocated in its reform

(describing the contents of the Patten reforms).

<sup>75</sup> WHITE PAPER (Feb. 1988), *supra* note 15; GREEN PAPER (May 1987), *supra* note 15; WHITE PAPER (Nov. 1984), *supra* note 15; GREEN PAPER (July 1984), *supra* note 15.

<sup>76</sup> See Basic Law, *supra* note 21, art. 68. "The Legislature of the Special Administrative Region shall be constituted by election." Although the "method for forming" the Legislature is to be "specified in the light of the actual situation" in the S.A.R. and "in accordance with the principle of gradual and orderly progress," the "ultimate aim is the election of all members of the Legislative Council by universal suffrage." *Id.*; *id.* annex II (providing for the ratio of members returned by directly elected — and presumably universal suffrage-based — geographic constituencies, by more narrowly elected functional constituencies, and by an election committee to be 24:30:6 in the second term of the S.A.R. Legislature and 30:30:0 in the third term); *N.P.C. Decision*, *supra* note 21, § 6 (prescribing a ratio of 20:30:10 for the first S.A.R. legislature); Draft Basic Law of the Hong Kong Special Administrative Region of the P.R.C. (for Solicitation of Opinions) (April 1988), *reprinted in* THE HONG KONG BASIC LAW: BLUEPRINT FOR STABILITY AND PROSPERITY UNDER CHINESE SOVEREIGNTY?, *supra* note 21; *id.* art. 67 (providing that the S.A.R. legislature "shall be constituted by a combination of direct and indirect elections" as prescribed in Annex II, with the procedures set forth in Annex II subject to "modifi[cation] in light of the actual situation" in the S.A.R. and "in accordance with the principle of gradual and orderly progress"); *id.* annex II (setting forth four alternative mixes of directly and indirectly elected seats for the legislature); Basic Law of the Hong Kong Special Administrative Region of the P.R.C. (Feb. 1989) (draft) art. 67, *reprinted in* THE HONG KONG BASIC LAW: BLUEPRINT FOR STABILITY AND PROSPERITY UNDER CHINESE SOVEREIGNTY?, *supra* note 21 (containing substantively the same terms as Article 68 of the final Basic Law); *id.* annex II (providing a ratio of geographic to functional constituencies that rises to 40:40 in the third and fourth terms of the legislature); *cf.* Joint Declaration, *supra* note 39, annex I, § I ("The legislature of the Hong Kong Special Administrative Region shall be constituted by elections.").

<sup>77</sup> See *supra* text accompanying notes 14-15.

plans during the 1980s, the colonial government had invoked seriously flawed or rigged public opinion surveys that severely understated popular support for more rapid democratization.<sup>78</sup> At the advent of the endgame, there was clear popular backing for a fairly robust form of democratic reform. The violent suppression of the 1989 student-led movement in Beijing and the perceived implications for post-reversion Hong Kong galvanized ordinary Hong Kongers to demand changes that would give them a more direct and institutionalized voice in the territory's governance. Reacting to the mass sentiments that had brought one-sixth or more of the colony's population into the streets, even the conservative members of the entirely-appointed, cabinet-like Executive Council ("Exco") and the mostly-appointed Legco backed a proposal to make half of the legislature popularly elected in 1995.<sup>79</sup> Establishment figures, such as Exco Senior Executive Councillor Dame Lydia Dunn, and Legco members closely tied to business interests, remarked publicly that the Hong Kong people were no longer "apolitical" and should be permitted to vote in direct elections for the territory's main representative body.<sup>80</sup> The results of the 1991 Legco elections, the first to include directly elected seats based on universal suffrage, further supported the conclusion that the Hong Kong people wanted democratization. Candidates from the United Democrats of Hong Kong ("U.D.H.K.") and Meeting Point, the territory's two nascent pro-democracy parties that later merged to form the Democratic Party, and pro-democracy independents nearly swept the contests

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<sup>78</sup> See, e.g., Philip Bowring and Emily Lau, *Without a Fight*, FAR E. ECON. REV., Feb. 1, 1990, at 16; Frank Ching, *The Betrayal of Hong Kong*, FAR E. ECON. REV., May 19, 1994, at 36 [hereinafter Ching, *The Betrayal of Hong Kong*]; Frank Ching, *Past Imperfect*, FAR E. ECON. REV., Oct. 29, 1992, at 23 [hereinafter Ching, *Past Imperfect*] (describing a flawed 1984 survey understating support for universal suffrage and a flawed 1987 survey used to justify the delayed introduction of direct election for some Legco seats); *Hong Kong: Mother and Father Do Not Know Best*, *supra* note 26, at 29 (describing the delayed introduction of direct balloting for Legco and attributing the delay to British authorities' succumbing to pressure from the P.R.C.).

<sup>79</sup> See Frank Ching, *Something Britain Can Do*, FAR E. ECON. REV., Mar. 10, 1994, at 30.

<sup>80</sup> See, e.g., Lau, *supra* note 16, at 18 (presenting the comments of Lydia Dunn and Legco "conservatives" with ties to the business community); Ching, *supra* note 79, at 30 (describing the Exco and Legco electoral reform proposal of 1989).

for the new broadly and directly elected seats.<sup>81</sup>

Against this background, the colonial government and Hong Kong's emergent liberal and pro-democracy politicians advanced their arguments concerning public attitudes toward legal reforms to expand democracy in the territory. Their principal argument in the initial conflicts over Governor Patten's program to expand the electorate for Legco was, simply, that the Hong Kong people did in fact want democratic reforms. The camp divided over whether the people wanted only the Patten reforms or required more extensive changes. Claiming a popular mandate for the proposals he had just outlined and defending them against calls for more sweeping moves, Patten explained that his "gut instinct" was that the Hong Kong people wanted greater democracy but that they wanted it "secured in a way which has a good chance of lasting" beyond July 1, 1997.<sup>82</sup> Governor Patten argued that, to ensure their survival, any reforms to electoral laws had to be compatible with the Basic Law. He asserted that his plan met that criterion while the proposals of the more radical democrats, who sought to have half or more of the seats in Legco directly elected in 1995, did not.<sup>83</sup> Patten added that his plan also would accurately reflect the democratic preferences of the territory's people. "We shouldn't be prepared to go further than the people of Hong

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<sup>81</sup> See Stacy Mosher, *Liberal Landslide*, FAR E. ECON. REV., Sept. 26, 1991, at 19 (describing the outcome of the 1991 Legco elections); see also MINERS, *supra* note 6, at 116-17 (describing the evolution of electoral rules for Legco).

<sup>82</sup> *A Different Style*, *supra* note 44, at 22.

<sup>83</sup> See *id.* The N.P.C. Decision provided that "[i]f the composition of the last Hong Kong Legislative Council before the establishment of the Hong Kong Special Administrative Region is in conformity with the relevant provisions of this Decision and the Basic Law," its members could "become members of the first Legislative Council of the Region." N.P.C. Decision, *supra* note 21, § 6. The N.P.C. Decision further provided that a pre-reversion legislature (and thus a 1995-selected Legco) that hoped to "ride the through train" to become the first the S.A.R. legislature had to be composed of twenty members chosen by direct election from geographic constituencies, ten members chosen by an election committee, and thirty members selected by "functional constituencies." *Id.* Under Governor Patten's plan, later passed by Legco, the Legco elected in 1995 would include twenty directly elected seats based on universal suffrage in geographic constituencies, ten seats indirectly elected by a committee drawn from elected members of local representative bodies, and thirty seats chosen by functional constituencies, many of which included new or expanded electorates that, in effect, gave most employed people in Hong Kong a "second vote" beyond their votes in a geographic constituency. See Electoral Provisions Ordinance, Cap. 367 (1994); see also *supra* note 74.

Kong are prepared to go," the Governor explained, but "we shouldn't be prepared to go less far" either.<sup>84</sup> As further assurance that the reforms would reflect the people's views, the electoral laws that would govern the 1995 balloting, Patten emphasized, would be approved by the existing Legco, which represented "the balance of opinions within the community."<sup>85</sup> Looking back on the process after his proposals passed Legco, Patten asserted that "[t]here's never been a moment during the months of debate [on the political reform plan when] anybody could actually claim the public was not supporting [Patten's] proposals."<sup>86</sup>

During the 1994 Legco debates on Patten's reform package, leading pro-democracy Legco members agreed with the Governor's general assertion that the people desired democratization. Meeting Point's Leong Che-hung proclaimed that it was up to legislators to express the desires of the Hong Kong people by casting votes that reflected their constituents' pro-democracy feelings and the pro-democracy platforms on which many members had run for their seats. Prominent Legco Democrat Szeto Wah maintained that Legco members' voting for democratic reform was necessary, lest "others think that the Hong Kong people want to surrender, don't want democracy and are willing to kowtow, give in and cede."<sup>87</sup> Any such thoughts, Szeto's colleague Martin Lee emphasized, were misplaced because the Hong Kong "people recognize that the difference in approach to . . . democracy" in Hong Kong from that in China was among the "greatest threat[s]" transitional Hong Kong faced.<sup>88</sup>

When it came to the details, however, many of the territory's pro-democracy leaders and lawmakers argued that the Patten reforms fell short of popular preferences. They warned that, notwithstanding the Governor's claims, the British authorities in the early 1990s were continuing their tradition of providing less

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<sup>84</sup> *Patten To Follow Will of HK People in Reform*, Agence France Presse, Dec. 3, 1992, available in LEXIS, Asiapc Library, Allasi File.

<sup>85</sup> *Id.*

<sup>86</sup> Chris Yeung & Fung Wai-kong, *Democracy Cannot Be Stopped*, S. CHINA MORNING POST, Mar. 27, 1996, at 3.

<sup>87</sup> *What the Legislators Said*, S. CHINA MORNING POST, June 30, 1994, at 6.

<sup>88</sup> Martin Lee, *From Tiananmen to Hong Kong: The Next Human Rights Tragedy Is Arriving on Schedule*, WASH. POST, June 22, 1994, at A21.



democratization than the people wanted. Amid the bitter and ultimately fruitless Sino-British negotiations that preceded Governor Patten's submission of his proposals to Legco, Meeting Point's Cheung Bing Leung charged that Britain and China were doing plenty of "thinking about their interests," but were not giving enough consideration to the interests of the Hong Kong people.<sup>89</sup> With the outline of the Patten plan on the table, a pro-democracy politician argued that "[p]eople in Hong Kong remain dissatisfied because their democratic wishes have been continuously ignored" amid a Sino-British collaboration to seek "converge[nce] with a post-1997 political system set down in the Basic Law" which "falls short of [the Hong Kong people's] requirements."<sup>90</sup>

Accordingly, pro-democracy politicians advocated reforms that, they claimed, better reflected popular preferences as they understood them. Independent Legco member Emily Lau proposed, and almost won a majority for, a substantially more democratic alternative to Governor Patten's bill.<sup>91</sup> As Martin Lee characterized the intramural struggles of the years preceding the 1995 Legco elections, Hong Kong's Democrats had "consistently pushed for genuine democracy over [both] Britain[s] and China's objections . . . because that is what the people of Hong Kong want."<sup>92</sup> The pattern of Hong Kong politicians pressing for more than the colonial government was prepared to grant continued after the enactment of the Patten reforms and amid China's preparations to replace the Legco elected in 1995. Most notably, Frontier, a political organization founded by several pro-democracy legislators in 1996, declared that its platform included equal and universal suffrage and the right of the Hong Kong people to draft their own constitution — one that presumably would surpass the Basic Law in reflecting the Hong Kong people's

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<sup>89</sup> Louise do Rosario, *Raising the Ante*, FAR E. ECON. REV., Dec. 9, 1993, at 14.

<sup>90</sup> *Time for Us To Command Respect*, S. CHINA MORNING POST, Nov. 15, 1992.

<sup>91</sup> See Louise do Rosario, *Patten's Progress*, FAR E. ECON. REV., July 14, 1994, at 20; Chris Yeung, *Patten Wins; 4:35 a.m.: Narrow Defeat of Emily Lau's Bill for Full Democracy Ends Legislators' Longest Day*, S. CHINA MORNING POST, June 30, 1994, at 1.

<sup>92</sup> Edward A. Gargan, *Pro-China Party Appears Big Loser in Hong Kong Election*, N.Y. TIMES, Sept. 18, 1995, at A8.

democratic preferences.<sup>93</sup>

Although they differed over the details of the form of democratization best suited to the wishes of the Hong Kong people, the colonial government and the territory's liberal and pro-democracy politicians united in arguing that the public was opposed to China's plans to undercut and ultimately dissolve the Legco selected under the Patten reform laws. At the time of the 1995 balloting, Patten remarked:

It seems to me to be an astonishing way [for China] to win the hearts and minds in Hong Kong to say at the moment when the people of Hong Kong are taking part in the most credible and democratic elections in our history that you are going to give the whole thing the thumbs down.<sup>94</sup>

Governor Patten later commented that the plan to replace the Legco chosen in those elections with a Provisional Legislature was not only unlawful, but was also "plainly wrong . . . in the eyes of Hong Kong people."<sup>95</sup>

Legco member Szeto Wah attacked China's moves to establish the Preliminary Working Committee, which was initially designed as part of a pro-China shadow government for pre-reversion Hong Kong, and the Provisional Legislature, which was to succeed the elected Legco at reversion and which functioned as a rival legislature during the final months of colonial rule. Szeto pressed Legco to declare these moves to be contrary to the aspirations of the Hong Kong people, as well as incompatible with the Basic Law and the Joint Declaration.<sup>96</sup> Similarly Democratic Party member Lo Chi-kin commented that "public opinion is on our side" in the fight against a Provisional Legislature.<sup>97</sup>

In the same vein, Martin Lee stressed that China's establish-

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<sup>93</sup> See *Lawmakers Create Pro-Democracy Group*, ASIAN WALL ST. J., Aug. 27, 1996, at 7.

<sup>94</sup> Gargan, *supra* note 92, at A8.

<sup>95</sup> Yeung & Fung, *supra* note 86, at 3.

<sup>96</sup> See Chris Yeung & Linda Choy, *PWC Adamant on Body To Run Territory*, S. CHINA MORNING POST, Dec. 7, 1994, at 1.

<sup>97</sup> Louise do Rosario, *Hollow House*, FAR E. ECON. REV., Nov. 24, 1994, at 26.

ment of appointed legislative and quasi-legislative bodies manifested a profound disregard for popular preferences. He complained that China's moves displaced Hong Kong's already established, "well-tested, respected and effective method for knowing what Hong Kong people think. Not an appointment system — but genuine democratic elections."<sup>98</sup> Moreover, Lee asserted that the people of Hong Kong had shown a serious "lack of confidence in Beijing's plans"<sup>99</sup> to displace elected bodies. Elaborating on this theme, Lee added that "the pandering of Hong Kong P.W.C. members" to China's policies on Legco and other matters had "shocked and saddened [the] Hong Kong people."<sup>100</sup> Furthermore, the pro-democracy critique continued, the Legco members who supported the Preparatory Committee's formal decision to establish a Provisional Legislature had abandoned the mandate from the people of Hong Kong who had elected them to office.<sup>101</sup>

The ties that bound liberal politicians and colonial authorities together in asserting the unpopularity of plans to roll back democratization began to fray when the territory's most ardent democrats perceived the colonial government to be softening in its unwillingness to compromise with China on the dismantling or displacement of Legco.<sup>102</sup> These pro-democracy politicians condemned the Patten administration for "selling out" the electorate and "duck[ing] the issues of greatest concern to Hong Kong people."<sup>103</sup>

Despite their disagreements on some issues, colonial government officials and Hong Kong's pro-democracy politicians pointed to many of the same indicators as evidence supporting their

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<sup>98</sup> Lee, *Why the PWC Failed*, *supra* note 67, at 10.

<sup>99</sup> Lee, *Selling an Unconsulted Future Hong Kong in America*, *supra* note 67. Lee added that it was up to Hong Kong and Macao Affairs Office director Lu Ping, as head of the P.W.C., to explain and presumably to rectify this popular lack of confidence. *Id.*

<sup>100</sup> Lee, *Why the PWC Failed*, *supra* note 67, at 10.

<sup>101</sup> See *id.*; Fung Wai-Kong & Quinton Chan, *Democrats Warn of 'Puppet Legislature': 'It's not Hong Kong People Ruling Hong Kong but Hong Kong People Ruining Hong Kong'*, S. CHINA MORNING POST, Mar. 26, 1996, at 4.

<sup>102</sup> See Martin Lee, *The Sell-Out that Has To Stop*, S. CHINA MORNING POST, July 1, 1995, at 19 (criticizing Governor Patten's consideration of a D.A.B. leader's proposal for fresh elections for a legislature under procedures more acceptable to Beijing).

<sup>103</sup> Fung & Won, *supra* note 31, at 1.

contention that the people of Hong Kong wanted democratic reforms in the early and middle 1990s and opposed China's plans to roll back such changes. Despite China's vocal opposition from the beginning, Governor Patten's proposals fared quite well in early public opinion surveys, in anecdotal measures of popular sentiment, and, indirectly, in the Governor's buoyant approval ratings.<sup>104</sup> Pro-democracy candidates' near sweep of the most broadly elected constituencies in the 1995 elections prompted Martin Lee, Patten, and others to proclaim a popular mandate for the democratic reforms and the parties and legislators who had backed them.<sup>105</sup> The pro-China daily *Ta Kung Pao* appeared to concede the popularity of the democrats' platforms. It reacted to the 1995 elections by suggesting that the democrats' victories at the polls showed the wisdom of Chinese senior leader Deng Xiaoping's 1987 comment that popularly elected leaders might not be the best choice to rule Hong Kong.<sup>106</sup>

According to some observers, popular opposition to China's establishment of a full-fledged "second stove," a shadow government to rival the colonial governor and Legco structure, was so strong and so obvious that it prompted the P.R.C. to retreat to the more temperate measure of establishing only the P.W.C. in

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<sup>104</sup> See, e.g., Frank Ching, *Cleared for Action*, FAR E. ECON. REV., Oct. 22, 1992, at 20-21 (describing popular support for Governor Patten's policy speech); Lim Soon Neo, *Hong Kong: Patten Fights a Rearguard Action*, BUS. TIMES (Singapore), Oct. 5, 1994, at 4 (discussing a survey finding Patten's approval rating at 59.6% in his first year in office and 56.7% in his second year); Tai Ming Cheung, *Pressure Tactics*, FAR E. ECON. REV., Nov. 5, 1992, at 8-9 (discussing polls and public hearings indicating popular support for Patten reforms).

<sup>105</sup> See, e.g., Gargan, *supra* note 92, at A8 (discussing Martin Lee's comments linking Democratic Party victories in the elections to support for democratic reform); Sheila Tefft, *How One Bold Man Stands Up to China*, CHRISTIAN SCI. MONITOR, Oct. 3, 1995, at 1 (quoting Martin Lee's comment, "[i]f this election shows anything, it shows that the Hong Kong people want Legco to defend them" against China's anti-democratic plans); Yeung & Fung, *supra* note 86, at 3 (quoting Governor Patten's comments, a few months after the election, that 60%-70% of the people supported the democrats in Legco).

<sup>106</sup> See Louise do Rosario, *Stand Up and Be Counted*, FAR E. ECON. REV., Sept. 28, 1995, at 16-17. The Deng-prescribed policy of Hong Kong people ruling Hong Kong meant a rule by people who loved the motherland and loved Hong Kong — *aiguo aigang*, in the usual formulation. This criterion of Chinese patriotism imposed an additional requirement beyond popularity with the people of Hong Kong or success in open elections. See *id.*

response to the Patten reforms.<sup>107</sup> Public opinion surveys seemed to confirm liberal-democratic claims that the people disliked and mistrusted the P.R.C.'s new appointive organs. One poll found that nearly two-thirds of the respondents believed that the P.W.C. was not working in the interests of the Hong Kong people as it laid some of the groundwork for Legco's replacement by a Provisional Legislature.<sup>108</sup> Another poll conducted only months before reversion indicated that fewer than one in six Hong Kongers expected the Provisional Legislature to perform better than Legco.<sup>109</sup>

Nonetheless, liberal and pro-democracy leaders and officials in Hong Kong could not completely discount signs that popular support for Patten-style or more radical democratization was always soft and had eroded in the face of China's increasingly shrill and clearly uncompromising opposition during the middle of the 1990s. Many of the Hong Kong people who supported democratic reform in general wanted an arrangement that would be acceptable to China and thus leaned toward compromise and a more moderate rate of democratization.<sup>110</sup> In addition, the democratic landslide of 1995, like that of 1991, occurred in an election in which only a little more than one-third of the registered voters, and a still smaller share of the eligible electorate, turned out.<sup>111</sup>

These facts suggested that the absence of popular support for

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<sup>107</sup> See Tai Ming Cheung, *Frontal Assault*, FAR E. ECON. REV., Apr. 1, 1993, at 10-11; see also Tai Ming Cheung, *Stalling for Success*, FAR E. ECON. REV., July 1, 1993, at 22 (describing the P.W.C. as a possible component in the "second stove").

<sup>108</sup> See do Rosario, *supra* note 21, at 18; see also Lee, *Why the PWC Failed*, *supra* note 67, at 10 (claiming that the P.W.C.'s credibility with the Hong Kong people reached its nadir on the eve of its supersession by the Preparatory Committee).

<sup>109</sup> See Andy Ho, *All's Well on the Economic Front*, S. CHINA MORNING POST, Dec. 31, 1996, at 17.

<sup>110</sup> See, e.g., Danny Gittings & Dick Chan, *Push Ahead on Reforms, Says Survey*, S. CHINA MORNING POST, Feb. 20, 1994, at 1 (describing the mixed picture of support for democracy and disagreement about the pace of change in an early 1994 poll); *Hong Kong's Clash of Wills*, ECONOMIST, Dec. 12, 1992, at 16 (describing the slight fall in popular support for Patten reforms in the wake of weeks of P.R.C. criticism).

<sup>111</sup> See, e.g., *Hong Kong: Mother and Father Do Not Know Best*, *supra* note 26, at 11; C.K. Lau, *Democracy Is Out for the Count*, S. CHINA MORNING POST, Mar. 11, 1995, at 17.

the institutional arrangements favored by the P.R.C. did not reliably translate into ardent popular support for Governor Patten's or Legco democrats' positions. Even the most zealous opponents of China's plans conceded that popular attitudes about the legislature and democratic reform included a desire to avoid fruitless conflict with the territory's future masters and a pragmatic inclination not to challenge a *fait accompli*. At the very least, Hong Kongers' apparent confidence in the territory's economy and moderate and stable emigration rates suggested that there were limits to the intensity of the Hong Kong people's opposition to the expected fate of democratic reforms and the last colonial Legco.

Faced with these difficulties, adherents to the liberal or pro-democracy line argued that unfavorable indicators about the people's actual preferences were misleading. Partisan commentators attributed low voter participation rates not to a lack of support for the Patten reforms or other models of democratization, but to other factors. Among the alternative causes cited were the sudden and dramatic expansion of the eligible electorate to include a vast number of inexperienced potential voters, a cumbersome registration procedure, the illiteracy of nearly ten percent of the potential electorate, the failure to strike emigres from the voter rolls, the lack of an absentee ballot option, a desire to register discontent with the colonial government by refusing to participate in its elections, and a sense that voting would be futile because Legco had never had much power in Hong Kong's executive-led government or because the arrival of July 1, 1997 would bring the dissolution of the 1995-elected legislature.<sup>112</sup> Liberals and democrats further argued that the opinion polls showing mixed or waning support reflected disagreements among the people about the appropriate extent or pace of democratization, not a genuine lack of popular enthusiasm for democracy. Pro-democracy leaders also suggested that the seemingly weak

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<sup>112</sup> See *supra* note 111; see, e.g., Louise do Rosario, *Colonial Standoff: Reforms Bill Passed as Sino-British Talks Stalemate*, FAR E. ECON. REV., Mar. 10, 1994, at 22-23; do Rosario, *supra* note 89, at 14; Louise do Rosario, *Sharp Distinction*, FAR E. ECON. REV., Sept. 7, 1995, at 28-29 [hereinafter do Rosario, *Sharp Distinction*]; Hong Kong: *Mother and Father Do Not Know Best*, *supra* note 26; Lau, *supra* note 111, at 17. In the 1995 elections, 2.6 million votes were cast, or 36% of the much larger electorate than that which turned out at a 39% rate to cast 1 million votes in the 1991 Legco elections. See Bruce Gilley, *Old Game, New Strategy*, FAR E. ECON. REV., May 23, 1996, at 31-32.

public support merely showed the people's reluctance to advocate openly positions that China had sternly rejected, not a true lack of popular sympathy with these positions.<sup>113</sup>

Colonial officials and liberal politicians also predicted that, regardless of what measures of public opinion might seem to indicate, rolling back democracy after reversion would bring instability to Hong Kong. One democratic politician warned early in the debates over democratic reform, "[U]nless, and until, Britain and China are both willing and ready to address the issue . . . [t]here will continue to be discontent, which will bubble to the surface at regular intervals."<sup>114</sup> Patten asserted that if China went forward with plans to roll back democratic reforms, it would face the difficult task of having "to explain that to the hundreds of thousands of people in Hong Kong who will have taken part in elections in a calm, sensible and competent way."<sup>115</sup> Failing to accomplish the nearly impossible task of convincing the people of the need to take such measures, Patten implied, would be costly to China and its Hong Kong allies. Patten, Emily Lau, and others were more blunt and strident in their comments about the Provisional Legislature arrangement on the eve of reversion, dubbing it a recipe for "chaos" in Hong Kong.<sup>116</sup>

Colonial government officials and Hong Kong's pro-democracy politicians also recognized that they needed to cultivate, rather than simply to assert or predict, popular support. Accordingly, many of their arguments to and about the Hong Kong people seemed designed to alter popular preferences. When Governor Patten and the liberals in Legco made impassioned and highly public proclamations that the people supported their proposals — especially when they proudly recounted Hong Kongers' successful

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<sup>113</sup> For one version of the "silent majority" argument, see Wong, *supra* note 61, at 14.

<sup>114</sup> *Time for Us To Command Respect*, *supra* note 90.

<sup>115</sup> *The China Prism*, FAR E. ECON. REV., Oct. 13, 1994, at 16 (interviewing Governor Patten).

<sup>116</sup> See Bruce Gilley, *Standing Pat: Governor Patten Won't Bend to Tycoon's Pleas*, FAR E. ECON. REV., May 30, 1996, at 16 (quoting Governor Patten on the unacceptability of compromise proposals on the Provisional Legislature); Yojana Sharma, *Hong Kong: Two Legislatures, One in Hong Kong, One in Shenzhen*, Inter Press Serv., Dec. 21, 1996, available in LEXIS, Asiapc Library, Allasi File (quoting Emily Lau on the coexistence of the Provisional Legislature and Legco).

participation in democratic elections, or invoked the special and distinct interests and character of the Hong Kong people — these skilled politicians were surely seeking to persuade the people, and not just to depict popular attitudes accurately. Hong Kong government and liberal warnings that reversing democratic changes after 1997 would trigger popular discontent also can not be taken entirely at face value. They suggested a darker side of the liberal-democratic strategy to develop mass support: the dire predictions of “chaos” appeared to be, in part, attempts to move the people to support democratization by appealing to their fears of instability.

At times, colonial officials and pro-democracy politicians were more explicit about the transformative nature of their project. In the Legco debates over Patten's proposals to reform the election laws, Szeto Wah commented, “A vote today can decide the attitude of the Hong Kong people towards 1997 — whether it is to kowtow or [to show] no fear.”<sup>117</sup> It was a matter of leading, as well as reflecting, popular attitudes.<sup>118</sup> Much later in the endgame, Emily Lau was a good deal more blunt about the task and perhaps less confident about the Democrats' ability to accomplish it. She noted that Hong Kong people still needed to be shown that democracy was “a good system that produces good results. If I can instill in the hearts of the people of Hong Kong a determination and desire for democracy,” Lau added, “then I will have succeeded.”<sup>119</sup>

The colonial authorities' and liberal politicians' attempts to shape popular opinions also included arguments that linked China's rejection of late colonial democratic reforms to the prospect of a betrayal of promises of autonomy and continuity in a legal, economic, and social order that the Hong Kong people valued. Governor Patten asserted, “If the Chinese dismantle [Legco electoral] arrangements which everybody accepts are fair and open, then it would be a step back from what Hong Kong has been promised.”<sup>120</sup> Patten suggested that for Beijing not “to

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<sup>117</sup> *What the Legislators Said*, *supra* note 87, at 6.

<sup>118</sup> *See id.*

<sup>119</sup> Kristin Choo, *Days of Rage: The Voice of Democracy for Hong Kong Throws Down the Gauntlet, Again*, CHI. TRIB., Dec. 29, 1996, at 3.

<sup>120</sup> Nick Rufford, *China Watches as Colony Holds Last Election*, SUNDAY TIMES (London), Sept. 17, 1995, at 21.



allow a fair vote for those who run our territory" would cast into serious doubt China's professed principle of allowing Hong Kong people to rule Hong Kong and China's intention to "honour the undertakings given to the [Hong Kong] people" in the Joint Declaration.<sup>121</sup> Martin Lee asserted that the adoption of the Provisional Legislature arrangement had "shattered" the P.R.C.'s "solemn promises" in the Basic Law and the Joint Declaration of "a legislature constituted by elections" and "a high degree of autonomy."<sup>122</sup> Lee warned more specifically that a Provisional Legislature unaccountable to the people of Hong Kong could not be expected to safeguard the people's human rights, which the Joint Declaration and the Basic Law had also promised to preserve.<sup>123</sup> Lee added that the Provisional Legislature, like the P.W.C. before it, would endorse laws that served the interests and implemented the will of Beijing, without regard for the needs and wishes of the people of Hong Kong.<sup>124</sup>

A final strand in liberal politicians' and colonial officials' arguments targeting the people of Hong Kong drew upon the basic rule-of-law ideas that bound together the broadly liberal-democratic perspective on legal and institutional issues in transitional Hong Kong. This line of argument sought to combine persuasive statements of elements of the liberal-democratic camp's vision of a just legal and institutional order for Hong Kong with assertions that the people of Hong Kong did or could embrace those principles. Thus, Governor Patten explained that the Sino-British negotiations over his electoral reform plan had stalled in 1993 when they "came to the heart of the Chinese position," which was to insist upon the exclusion of the Democratic Party from a legislature that would survive the transition. Given what the governor took to be sixty to seventy percent popular support for the Democratic Party, the Chinese stance was, as Patten saw it, irreconcilable with both the views of the Hong Kong people and with minimal democratic principles. Patten added that replacing the elected Legco with an appointed Provi-

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<sup>121</sup> Fung & Won, *supra* note 31.

<sup>122</sup> Lee, *Selling an Unconsulted Future Hong Kong in America*, *supra* note 67.

<sup>123</sup> See HK's Lee Says Colony Must Elect Own Legislature, Reuters, June 29, 1996, available in LEXIS, Asiapc Library, Allasi File.

<sup>124</sup> See Yojana Sharma, *Democrats Disheartened by Beijing's Selction*, Inter Press Service, Dec. 17, 1996, available in LEXIS, Asiapc Library, Allasi File (quoting Martin Lee); Fung & Chan, *supra* note 101, at 4.

sional Legislature was not only unpopular but also "plainly wrong."<sup>125</sup> Patten further argued that rolling back democratic reforms would stifle the "natural momentum of the development of civic consciousness and the creation of the institutions of civil society in Hong Kong," and also would ignore the recently expressed preferences of millions of voters.<sup>126</sup>

At the beginning of the Patten administration, Emily Lau had offered an argument similarly grounded in both normative principles and purported public preferences. She asserted that leaving behind strong democratic institutions in 1997 was "necess[ary] and desirab[le]" in its own right, as well as essential to the realization of the true "aspirations" of the Hong Kong people.<sup>127</sup> Just months before reversion, Lau argued that "with the end of colonial rule the only way to set up a *legitimate* legislature is to allow the Hong Kong people to elect it through universal suffrage" — a process that was uniquely able to yield a law-making body that would reflect the people's positions on democracy and other issues.<sup>128</sup> In the same vein, Martin Lee articulated his view that the position of representative of the people of Hong Kong, even if held only by virtue of Beijing's appointment, was a position that imposed a "solemn responsibility" to reflect accurately the popular will and to "defend Hong Kong's way of life" and the Joint Declaration, including its pledge to allow democratic elections.<sup>129</sup>

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<sup>125</sup> Yeung & Fung, *supra* note 86, at 3; see also Lawrence Chung, *China, Britain Trade Verbal Broadside as Votes Cast for Assembly*, Agence France Presse, Dec. 21, 1996, available in LEXIS, Asiapc Library, Allasi File (describing Governor Patten's and Foreign Secretary Rifkind's criticism of the election of the Provisional Legislature as an assault on democracy and a disregard for the expressed preferences of the Hong Kong people).

<sup>126</sup> *The China Prism*, *supra* note 115, at 16.

<sup>127</sup> Emily Lau, *Letter from Hong Kong*, FAR E. ECON. REV., July 9, 1992, at 24 (emphasis added).

<sup>128</sup> *Hong Kong Protestors Condemn Interim Legislature*, Reuters, Dec. 20, 1996 (emphasis added), available in LEXIS, Asiapc Library, Allasi File; cf. "Business as Usual" Post-1997, S. CHINA MORNING POST, July 1, 1996, at 1 (quoting Chief Secretary Anson Chan's comment that "[i]t goes without saying that a legitimate and truly representative legislature will do much to give confidence to the people of Hong Kong"). While the Hong Kong government did not view a representative legislature as one necessarily based on universal suffrage, the linking of legitimacy and democratic representation is similar to that reflected in Emily Lau's comments.

<sup>129</sup> Lee, *Why the PWC Failed*, *supra* note 67, at 10; see also Connie Law & Louis Won, *Pledge To Stand Firm on Party Principles*, S. CHINA MORNING

In this line of argument, appeals to Hong Kongers' emergent sense of local pride and political competence provided a crucial bridge between invocation of liberal-democratic principles and inculcation of popular preferences. For example, Governor Patten initially explained his democratic reform proposals as "commitment[s] to a system of values . . . which has near its core the proposition that the average man and woman of [Hong Kong] are a great deal better than the average."<sup>130</sup> The territory's most prominent legislator made a similar point a few years later when he proclaimed, in the wake of the 1995 Legco elections, "We are capable of being masters of our own house and of our own destiny."<sup>131</sup>

Appeals to the people's self-confidence and sense of distinctive accomplishment and character also served to rebut the China and pro-China side's powerful plays to Hong Kongers' sense of Chinese nationalism. Governor Patten derided China's "de[n]unciation of] fair elections in Hong Kong as something alien imported into Hong Kong against the will of the people" and countered that the turnout of millions of voters in the 1995 elections had shown China's claim to be groundless.<sup>132</sup> Facing strongly nationalist criticism from China and its allies, Martin Lee carefully explained that he was pro-reunification, pro-Hong Kong, pro-Joint Declaration, and not pro-British. To support this contention, Lee and other democrats could point to their considerable record of disagreements with the territory's colonial rulers on democratization and a host of other legal and political issues, and to the Chinese-sovereignty-accepting premises of many of their criticisms of the pro-China side.<sup>133</sup> There were, this line of argument indicated, no inevitable contradictions among liberal-democratic values, loyalty to Hong Kong's interests and values, and Chinese nationalism.

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POST, Dec. 29, 1995, at 5 (noting Martin Lee's view that members of the Preparatory Committee "must act as if they are the true representatives of the people of Hong Kong even though they have not been elected by [the] people").

<sup>130</sup> *A Different Style*, *supra* note 44, at 22.

<sup>131</sup> Gargan, *supra* note 92, at A8.

<sup>132</sup> See Yeung & Fung, *supra* note 86, at 3.

<sup>133</sup> Law & Won, *supra* note 129, at 5; see Lee, *Why the PWC Failed*, *supra* note 67, at 10.

### 2.2.3. *The Court of Final Appeal, the Rule of Law, and Other Popular Values*

While the colonial government and Hong Kong's pro-democracy politicians differed discernibly over "the people's" attitudes toward democratization, the Bill of Rights, and related legal reforms, a split between these two wings of the "liberal" or "pro-democracy" forces was a central feature of the dispute over what the people would or should think about proposed arrangements for the S.A.R.'s Court of Final Appeal. Officials of the British and colonial governments and Hong Kong's leading democratic politicians agreed that the C.F.A. question was entwined with the preservation of a rule of law for Hong Kong that was popular with the territory's citizenry and vital to a just and viable order for post-reversion Hong Kong. They differed over whether to accept a Court established under the terms the Sino-British agreements adopted in 1991 and in 1995 (after Legco had rejected legislation to implement the 1991 accord).

More specifically, the U.K. and the Patten administration backed, but prominent liberal and pro-democracy politicians opposed, a C.F.A. arrangement that effectively limited to one the number of foreign judges on the five-member bench, excluded "acts of state" such as foreign affairs and defense from the court's jurisdiction, and permitted the Court to be established a few years before reversion, under the 1991 deal, or immediately after reversion under the 1995 agreement. British and colonial officials assured the territory's residents that a C.F.A. set up in accordance with the Sino-British agreements was "in the interests of all the people of Hong Kong."<sup>134</sup> Central to those interests was the preservation of the rule of law that Hong Kong people seemed so clearly to value. Attorney General Mathews explained that "[t]he Government has no doubt it is in the best interests of the people

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<sup>134</sup> Kate Chattaway, *Hong Kong Council Urged To Back Court Deal*, Press Ass'n Newsfile, June 28, 1995, available in LEXIS, Asiapc Library, Allasi File (quoting Baroness Chalker of the Foreign Office); see also *A Court To Safeguard Hong Kong*, TIMES (London), June 14, 1995 (presenting a letter from Governor Patten describing his conviction that the C.F.A. agreement was "good for Hong Kong"); *HK Governor Leads Chorus of Calls To Pass Court Bill*, Agence France Presse, June 14, 1995, available in LEXIS, Asiapc Library, Allasi File (quoting Patten's statement that the 1995 deal was "profoundly in the interests of the people of Hong Kong").

of Hong Kong to implement the 1991 agreement," in large part because China had consented to continuance of an institution that would serve as a "crucial symbol and an embodiment of the rule of law."<sup>135</sup> The Secretary for Constitutional Affairs conceded that the 1991 deal might not be all that everyone wanted, but he urged Legco members to accept that a "moderation of aspirations" was in order.<sup>136</sup> Urging acceptance of the second deal, Patten assured the territory's citizens, whom Patten elsewhere characterized as drawn to Hong Kong by its rule of law, that the 1995 agreement was still "a good one for . . . the rule of law in Hong Kong."<sup>137</sup> The bill to implement the 1995 accord, argued Chief Secretary Anson Chan, would "ensure[] continuity of the rule of law in Hong Kong through the transition" and "safeguard public . . . confidence in Hong Kong."<sup>138</sup>

Rejecting the claims of democratic politicians, Hong Kong government officials argued that the Court bill, in both the 1991 and the 1995 versions, gave the people of Hong Kong no reason to conclude that the government was compromising, at the eleventh hour, the rule of law.<sup>139</sup> Rather, the Court bill would give the Hong Kong people a stronger local legislative foundation for the legal continuity that the framework legal arrangements for the reversion promised them. Attorney General Mathews argued that the bill to implement the 1991 deal was fully "consistent with the Joint Declaration and the Basic Law."<sup>140</sup> Although "some members of the legal profession," including many of the territory's leading liberal politicians, doubted this conclusion, Mathews stressed that it was "supported by a number of authoritative independent opinions."<sup>141</sup> In London, the Foreign Office took

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<sup>135</sup> *Courting the Right Bill*, S. CHINA MORNING POST, Apr. 2, 1995, at 13.

<sup>136</sup> Stacy Mosher, *Court of Contention*, FAR E. ECON REV., Dec. 19, 1991, at 10.

<sup>137</sup> *A Court To Safeguard Hong Kong*, *supra* note 134.

<sup>138</sup> Chris Yeung et al., *Fight Not Over, Says Martin Lee*, S. CHINA MORNING POST, July 27, 1995, at 1.

<sup>139</sup> For an example of colonial authorities' opposition to, and exasperation with, such arguments, see, for example, Maggie Farley, *Britain's Governor Chris Patten: Unmade in Hong Kong*, L.A. TIMES, July 2, 1995, at A4 (citing Patten's statement that with "[o]ne deal with China and suddenly, Martin Lee and others are saying, 'It's all over, the game is up.'").

<sup>140</sup> *Courting the Right Bill*, *supra* note 135, at 13.

<sup>141</sup> *Id.*

the same position with respect to the 1995 bill.<sup>142</sup> In the same vein, Patten assured Hong Kongers that the legislation to implement the 1995 accord provided for "a court that will, subject to the Basic Law, have precisely the same function and jurisdiction as the Judicial Committee of the Privy Council" in London, which served as Hong Kong's highest court under colonial rule.<sup>143</sup> Government accounts stressed that the bill's provision excluding acts of state such as defense and foreign affairs from the Court's purview exactly tracked the language of the Joint Declaration and the Basic Law. Legco critics' claims that the legislation took away something the people of Hong Kong otherwise would have enjoyed were, the Attorney General charged, "bizarre in the extreme, . . . wholly irresponsible, . . . totally misleading and very damaging to confidence of Hong Kong's future."<sup>144</sup> The limitation on the number of foreign judges, this line of argument continued, was consistent with the Joint Declaration and the Basic Law and thus not a cause for new worries among the people. In those legal texts, the Attorney General explained, the references to foreign "judges" easily meant one judge at a time and, the provisions permitting foreign judges to be invited "as required" did not mean "as it [*i.e.*, the Court] requires."<sup>145</sup>

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<sup>142</sup> See, e.g., Chattaway, *supra* note 134. Compare Court of Final Appeal Ordinance (1995), reprinted in 35 I.L.M. 207 (1996) with Basic Law, *supra* note 21, arts. 80-96 and Joint Declaration, *supra* note 39, art. 3(3), annex I, § III.

<sup>143</sup> Simon Holberton, *Hong Kong Law Under Chinese Law: The Interface Between Basic and Common Law*, FIN. TIMES, June 12, 1995, at 3. Governor Patten's qualifying phrase "subject to the Basic Law" troubled liberal and democratic politicians who viewed it as a possible sign of acquiescence in China's efforts to restrict the Court's jurisdiction and thereby undermine the rule of law. As these critics saw it, the "acts of state" provisions in the C.F.A. bill and the Basic Law and the provision in the Basic Law that assigned interpretive power to the N.P.C. threatened to leave the Court with too little power. Patten's qualifying phrase suggested that Patten was accepting that arrangement. Elsewhere, however, Patten was less equivocal and stated that he would never support "the establishment of a court which failed to continue the jurisdictional role of the Privy Council." Frank Ching, *Patten Accord: A Mixed Blessing*, FAR E. ECON. REV., June 29, 1995, at 36; see also Danny Gittings, *Leaks Reveal Real Deception*, S. CHINA MORNING POST, Aug. 10, 1997, at 10 (describing Patten's disclosure that he believed the inclusion of the "acts of state" exception was a mistake by the British).

<sup>144</sup> *A-G Rejects Attack on Rule of Law*, *supra* note 34, at 5.

<sup>145</sup> Kevin Hamlin, *Law: Agreeing with Whatever Peking Wants*, INDEPENDENT (London), Dec. 20, 1991, at 16. Mathews' argument about the number

The question of the people's views about the date of the Court's establishment was trickier for proponents of the C.F.A. deals. When the 1991 deal still held the prospect of setting up the Court well in advance of reversion, Hong Kong government officials stressed that this early establishment should and would appeal to the territory's residents. The Attorney General, the Chief Secretary, and others emphatically stated the government's position that implementing the 1991 agreement and setting up a C.F.A. before 1997 was "in the best interests of the people of Hong Kong."<sup>146</sup> When China backed away from the 1991 accord in the months before the second deal, Patten warned of the consequences of Hong Kong and Macao Affairs Office Director Lu Ping's suggestion that judges appointed to a Court established under an ordinance belatedly implementing the first agreement might not be allowed to remain on the S.A.R.'s highest bench. The Governor cautioned that these remarks, which he saw as inconsistent with a meaningful pre-reversion establishment of the Court, would create confusion among the people of Hong Kong and undermine their confidence in the territory's rule of law.<sup>147</sup> If the court were not set up before 1997, an official government statement similarly warned, there would be a "judicial vacuum" at the time of reversion and "public . . . confidence in Hong Kong's legal system" would be "seriously undermined."<sup>148</sup>

When the 1995 accord decisively eliminated the possibility that the Court could be set up with P.R.C. consent before reversion, Hong Kong government proponents of legislation to implement the new deal had to offer different arguments for why the people would or should find an immediately post-reversion establishment date appealing. The principal claim was that the Hong Kong

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of judges drew additional support from a much-noted ambiguity in the Chinese text, in which the relevant term "*faguan*" translates equally well as "judge" and "judges." See Basic Law, *supra* note 21, art. 82.

<sup>146</sup> *Courting the Right Bill*, *supra* note 135, at 13 (quoting the Attorney General); see also R.J.F. Hoare, *Bill Does Not Contravene Joint Declaration*, S. CHINA MORNING POST, Dec. 19, 1994, at 20 (presenting similar comments from the Director of Administration of the Government Secretariat R.J.F. Hoare, a frequent spokesman for the government's position on the C.F.A. bills); Louis Won & Lok Wong, *From Politicians: Outrage*, S. CHINA MORNING POST, June 10, 1995, at 3 (quoting the Attorney General and Chief Secretary).

<sup>147</sup> See Fung Wai-kong, *Court Row Threatens Rule of Law — Patten*, S. CHINA MORNING POST, Dec. 12, 1994, at 1.

<sup>148</sup> Louise do Rosario, *No Appeal*, FAR E. ECON. REV., May 18, 1995, at 22.

people did or must recognize that failing to implement the deal would leave important matters dangerously unsettled. Attorney General Mathews explained that "[t]he alternative of rejecting the bill [would] leave the establishment of the Court of Final Appeal to the Hong Kong Special Administrative Region after 1 July 1997, creating damaging and unnecessary uncertainty about the eventual form of the Court of Final Appeal."<sup>149</sup> Chief Secretary Anson Chan warned that supporting the symbolic "no confidence" motion that Legco democrats introduced to demonstrate their opposition to the 1995 C.F.A. bill would shake foreign investors' confidence in the territory, leaving "the ordinary men and women of Hong Kong [to] suffer."<sup>150</sup> On the other hand, Chan argued, passing the 1995 bill would eliminate the "uncertainty about the establishment of the Court" that had plagued people in Hong Kong for "too long" and had had "a damaging effect on confidence in the judicial system."<sup>151</sup> As the U.K.'s Foreign Office phrased argument, Legco's acceptance of the 1995 Court deal would allow "this matter [to be] cleared up for the sake of all the people of Hong Kong."<sup>152</sup>

These arguments from government sources in Hong Kong and London were primarily efforts to persuade a public that the C.F.A. bills' proponents recognized was not favorably disposed to the Court deals. Raising the specter of the damage to Hong

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<sup>149</sup> *HK Governor Leads Chorus of Calls To Pass Court Bill*, *supra* note 134; see also Diane Stormont, *Hong Kong Legislators Set To Back Court Bill*, Reuters, July 26, 1995, available in LEXIS, Asiapc Library, Allasi File (quoting Mathews' description of the consequences of not accepting the 1995 bill as "continuing uncertainty, continuing anxiety, continuing doubt and consequent loss of confidence"). The uncertainty that attended the absence of establishing the C.F.A., a senior Hong Kong government official explained, had "been a source of great concern to the people of Hong Kong." R.J.F. Hoare, *Passing Bill in Best Interests of HK*, S. CHINA MORNING POST, July 1, 1995, at 16 (presenting a letter from the Director of Administration of the Government Secretariat).

<sup>150</sup> Chris Yeung & No Kwai-yan, *Governor Survives Vote*, S. CHINA MORNING POST, July 13, 1995, at 1; see also Fanny Wong, *Reaction to Censure Reflects Concern*, S. CHINA MORNING POST, Feb. 19, 1997, at 14 (quoting Patten's criticism of Martin Lee for spreading misleading messages about Hong Kong by speaking ill of the 1995 C.F.A. agreement). Governor Patten asked rhetorically "What good can it possibly do to shake people's confidence in Hong Kong?" *Id.*

<sup>151</sup> Yeung et al., *supra* note 138, at 1; see also *A Court To Safeguard Hong Kong*, *supra* note 134 (quoting Patten that the 1995 "agreement avoids . . . further uncertainties for Hong Kong people").

<sup>152</sup> Chattaway, *supra* note 134.



Kong's society, economy and hallowed rule of law that would attend the proposed legislation's rejection was a tactic that sought to pressure, not merely to describe, the public. More subtly, the proponents' repeated invocation of the people's "interests" — rather than the people's "will" or "preferences" — suggested that the aim was to persuade the people to act and think in ways that departed from their immediate inclinations. Nonetheless, British and colonial authorities did not concede that the C.F.A. deals ran seriously afoul of popular preferences. Their arguments concerning the proposed legislation's efficacy in maintaining the rule of law proceeded from the premise that the people in fact were deeply attached to that rule of law. Further, the robust belief in popular rationality that ran through the public comments of senior colonial government officials suggested that they believed the people would ultimately bring their preferences into line with their interests.

Moreover, outwardly at least, officials of the British and Hong Kong governments at times expressed considerable confidence that the Hong Kong people already shared their views on the Court deals, or would do so after minimal explanation. A senior British negotiator opined that "people will agree we have done the right thing" once they "look at the alternatives" of leaving decisions on the Court's formation to be made after 1997 or acting unilaterally to establish a Court that would likely not survive the transition.<sup>153</sup> Similarly, Patten commented on Legco's passage of the 1995 C.F.A. bill: "I am sure it will be welcomed by the whole community . . . as a vote of confidence in Hong Kong's future." Patten also pointed to an early poll showing "three to one support" for the 1995 agreement as a basis for his conviction that "most people in Hong Kong believe[d]" that the deal was "a good one."<sup>154</sup>

Hong Kong's most prominent pro-democracy politicians maintained that the British and colonial authorities thoroughly mischaracterized the choices facing the people of Hong Kong and

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<sup>153</sup> Louise do Rosario, *A Court Too Far*, FAR E. ECON. REV., June 22, 1995, at 20.

<sup>154</sup> Diane Stormont, *HK Legislators Pass Final Appeal Court Bill*, Reuters, July 26, 1995, available in LEXIS, Asiapc Library, Allasi File; *A Court To Safeguard Hong Kong*, *supra* note 134; see also, Hoare, *supra* note 149, at 16 (presenting a senior colonial government official's comment that "the people of Hong Kong" had given the 1995 C.F.A. deal "a warm welcome").

the people's probable attitudes toward the situation. They too accepted that there were close connections between arrangements for the S.A.R.'s highest court and the preservation of the rule of law, but they argued that the relationship was not the one that proponents of the C.F.A. legislation asserted. Democratic Party leaders charged that the Court deal that the British pushed through in 1995 spelled the "downfall of the rule of law in Hong Kong," and was a "calculated condemnation of the Hong Kong people to the grimmest possible future."<sup>155</sup> They asserted that the Court deal bargained away the rule of law, "Hong Kong's most prized possession."<sup>156</sup> In the wake of the 1995 C.F.A. bill's passage, Martin Lee argued, "[I]t seems that hope is lost — not by Hong Kong people, who know only too well the value of our rule of law and way of life — but by the British Government and Governor Christopher Patten, who have now compromised irretrievably what would have been their greatest legacy to Hong Kong."<sup>157</sup> For Lee's Legco colleague Emily Lau, the colonial master had asked the "Hong Kong people" not to "look a gift-horse in the mouth" when it presented them with a deal that "compromised" their "interests."<sup>158</sup>

More specifically, these liberal legislators and politicians argued that Britain had "actually agreed with the Chinese Government to extend" the act of state exception to the Court's jurisdiction "to cover things which we know nothing about at the moment."<sup>159</sup> The common law, which was at the core of Hong Kong's rule of law, thereby would be converted from "the common law as we know it to a common law with Chinese characteristics,"<sup>160</sup> in violation of the Joint Declaration's pledge that the existing common law would "survive the transfer of sovereignty."<sup>161</sup> Under this arrangement, the argument continued, "Hong Kong people will never be able to challenge the Government" after

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<sup>155</sup> Yeung & No, *supra* note 150, at 1 (quoting Legco member Cheung Man-kwong).

<sup>156</sup> Lee, *Selling an Unconsulted Future Hong Kong in America*, *supra* note 67; see also do Rosario, *supra* note 153, at 20 (quoting Martin Lee).

<sup>157</sup> Lee, *supra* note 102, at 19.

<sup>158</sup> Emily Lau, *Testing Time for Political Players*, S. CHINA MORNING POST, July 24, 1995, at 18.

<sup>159</sup> Won & Wong, *supra* note 146, at 3.

<sup>160</sup> *Id.*

<sup>161</sup> *A-G Rejects Attack on Rule of Law*, *supra* note 34, at 5.

1997,<sup>162</sup> and the "public would not be protected by the rule of law" that the people cherished and upon which they depended.<sup>163</sup>

From the perspective of Hong Kong's leading liberal politicians, the 1995 deal's postponement of the Court's establishment date, coupled with the retention of the 1991 accord's limit on foreign judges, posed equally serious threats to the rule of law that the people desired. To a degree, the colonial authorities had assessed correctly the need to implement the 1991 agreement. Setting up the C.F.A. before reversion would heed a "clear call" from the Hong Kong public,<sup>164</sup> and was "desperately need[ed] . . . to preserve" the people's freedoms.<sup>165</sup> If China would not agree, the Hong Kong government's unilateral establishment of the C.F.A. before 1997 was the necessary and appropriate course.<sup>166</sup>

According to this line of argument, failure to have the Court up and running before reversion, an outcome mandated by the 1995 agreement, would leave Hong Kong with a Court staffed by judges who had attained their positions only after political screening and selection by China or its lackeys in the undemocratic and unlawful Provisional Legislature. Pro-democracy independent legislator, lawyer, and columnist Margaret Ng concluded that this arrangement would remove the last "built-in safeguard of the independence of the Judiciary" and of the rule of law.<sup>167</sup> It was, in Ng's view, the final absurdity of the transition awaiting Hong Kong's public.<sup>168</sup>

Leading pro-democracy politicians and legislators also rejected British and colonial authorities' arguments that the people of Hong Kong should and would welcome the 1995 Court bill

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<sup>162</sup> *In a State of Legal Confusion*, S. CHINA MORNING POST, June 17, 1995, at 17.

<sup>163</sup> *Clauses Raise Worries on Human Rights After '97*, S. CHINA MORNING POST, July 27, 1995, at 5.

<sup>164</sup> Louise do Rosario, *Cold Shoulder*, FAR E. ECON. REV., June 1, 1995, at 24-25 (quoting the spokesperson for independent, liberal Legco member Christine Loh).

<sup>165</sup> Martin C.M. Lee, *Enter the Dragon*, N.Y. TIMES, Oct. 26, 1994, at A27.

<sup>166</sup> See Lee, *Selling an Unconsulted Future Hong Kong in America*, *supra* note 67.

<sup>167</sup> Ng, *supra* note 42, at 21.

<sup>168</sup> See *id.*; Lee, *Selling an Unconsulted Future Hong Kong in America*, *supra* note 67.

because it would reduce uncertainty. It was "not true that any Court of Final Appeal which is certain to survive 1997 is better than uncertainty," argued one prominent Legco member.<sup>169</sup> Legco members from the political parties with the strongest popular support in Hong Kong similarly concluded that "remov[ing] the uncertainty about our legal system . . . at the cost of the rule of law itself" was not compatible with their constituents' interests or wishes, and accordingly opposed the 1995 bill.<sup>170</sup>

From this perspective, the fact that Legco passed the 1995 C.F.A. legislation said little about the people's preferences. After all, Legco had rejected a slightly more appealing bill in 1991. In addition, the government rushed the 1995 bill through before the 1995 elections could bring more democrats into the chamber, and the government had presented the 1995 bill to Legco as a *fait accompli* not open for debate or revision.<sup>171</sup> Moreover, although Martin Lee failed to win passage of a no-confidence motion against the governor for supporting the 1995 C.F.A. legislation, he asserted that he had nonetheless succeeded "in showing Hong Kong people how Mr. Patten had betrayed the rule of law."<sup>172</sup> He pledged that the Democratic Party would "continue to fight for a real Court of Final Appeal and the preservation of the rule of law" and "to see to it that Governor Patten and the British Government are judged in the court of public opinion."<sup>173</sup>

On the whole, liberal and pro-democracy legislators' and politicians' arguments about popular attitudes toward the C.F.A. often assumed or asserted significant existing popular opposition to the Court deals, or at least to what liberal critics claimed the

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<sup>169</sup> Margaret Ng, *Undermining the Right to Legal Redress*, S. CHINA MORNING POST, June 20, 1995 at 21.

<sup>170</sup> Martin Lee, *The Courtship of Mr. Hoare*, FAR E. ECON. REV., July 27, 1995, at 4. For support for the proposition that the parties were attuned to their constituents' preferences on this issue, opponents of the bill could point to public opinion surveys suggesting extremely low expectations of the Court system that would be provided under the Sino-British accords. Even in 1993, when the 1991 deal was still considered possible, a poll found that more than half of the territory's residents thought it would not be possible to sue successfully the government after July 1, 1997, and nearly half thought it would not be possible to sue successfully mainland companies after 1997. See Jacqueline Leong, *A Few Points of Law for Hong Kong*, S. CHINA MORNING POST, Aug. 8, 1993, at 11.

<sup>171</sup> See, e.g., Ching, *supra* note 143, at 36.

<sup>172</sup> Yeung & No, *supra* note 150, at 1.

<sup>173</sup> Lee, *supra* note 102, at 19.

C.F.A. bills portended for the rule of law. Nonetheless, there seemed to be significant limits to their confidence that the Hong Kong people were already solidly on their side. Many of the foregoing analyses of the C.F.A. arrangements' flaws emphasized the people's "interests," with only occasional invocations of the people's existing preferences. That feature often made the critics' arguments, like those of their opponents in the British and colonial governments, sound more like efforts to persuade the people and less like descriptions of established popular views, with implicit cautions about the costs of disregarding them.

The somewhat crusading, even quixotic, tone of Lee's comments in the wake of the failed no-confidence motion further suggests some recognition in liberal and democratic quarters that popular support for their position on the Court deals was shaky and that persuading the people to back the critics' positions would be difficult. Compared to the individual rights issues at stake in the controversy over the Bill of Rights and the principles of democracy at issue in the conflict over electoral reform, the C.F.A. controversy raised less immediate and emotional concerns. The court that the C.F.A. was supposed to "replace," the Privy Council in London, doubtless seemed a remote legal institution compared to recently enacted local rights legislation and the territory's highly visible and recently invigorated legislature. Moreover, for all the evident popular embrace of the rule of law, there was relatively little love for the heavily expatriate, procedurally prolix, and predominantly English language-based judiciary that democrats and liberals said was at risk.<sup>174</sup> In any event, the alliance of the P.R.C. and the British authorities in favor of the C.F.A. bill surely appeared formidable, perhaps even futile to oppose.

Faced with such obstacles to securing firm popular support, liberal and democratic leaders in the territory sought to link the Court issue not only to popular rule-of-law concerns but also to other values that they thought were appealing to the Hong Kong people. Arguments reflecting this strategy also produced additional points of conflict with the British and colonial government authorities in the battle over popular attitudes toward the Court

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<sup>174</sup> See, e.g., Ming K. Chan, *The Imperfect Legacy*, 18 U. PA. J. INT'L ECON. L. 133, 135-40 (1997); "Dickensian" System Adds to Frustration, S. CHINA MORNING POST, Mar. 28, 1994, at 6; Leong, *supra* note 170, at 5.

bills. Liberal and pro-democracy political leaders asserted that, contrary to claims from the colonial administration and London, the Sino-British deals concerning the C.F.A. compromised the Joint Declaration and the Basic Law and thus portended a broader betrayal of legal promises that the people held dear. Legco opponents of the 1991 bill argued that the dispute over foreign judges was not just about the number of foreign judges that the Joint Declaration or the Basic Law required, or even about whether the provision on the Court's composition fatally undercut the special ability of politically insulated foreign judges to protect the rule of law that the people valued. Beyond these important issues, the controversy was also about the broader integrity of the S.A.R.'s framework legal arrangements which, if breached with respect to the Court, would unravel further and lead to the Hong Kong people's loss of many other rights and freedoms through Sino-British collusion.<sup>175</sup>

In the view of prominent pro-democracy politician and journalist Emily Lau, the "C.F.A. saga" was "symptomatic of political developments in Hong Kong in general" in which "Chinese pronouncements which are in breach of the Joint Declaration and the Basic Law" were routinely accepted and "the interests of the Hong Kong people" were regularly "compromised."<sup>176</sup> With the 1995 deal implemented, Martin Lee opined, the Hong Kong people had reason to, and did, fear a final two years of British rule marked by repeated sacrifices of their interests on the altar of Sino-British cooperation.<sup>177</sup> More specifically, this line of argument asserted that the "act of state" provisions that the proponents of the C.F.A. deals sought to dismiss as innocuous threatened the rights and liberties of the territory's citizens. Martin Lee asserted that the failure to circumscribe these "political" exceptions to the Court's jurisdiction raised the prospect that "Hong Kong people" would be "treated the same way" as their compatriots in China — a frightening and troubling prospect for a people who, in the controversies surrounding the Bill of Rights, showed that they were "extremely concerned over any deprivation of individual

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<sup>175</sup> See, e.g., Mosher, *supra* note 136, at 10.

<sup>176</sup> Lau, *supra* note 158, at 18.

<sup>177</sup> See Lee, *supra* note 102, at 19.

liberties."<sup>178</sup>

Liberal and democratic opponents of the C.F.A. bill argued that the Court arrangement also imperiled the move toward democracy and autonomy that the territory's citizens prized. Patten's submission of the two, especially the first, C.F.A. bills to Legco could be cast as a step forward for democracy in the colony, giving the people's representatives a voice in the resolution of the Court issue.<sup>179</sup> There was also some force to Solicitor General Daniel Fung's point that an insistence on more than one foreign judge on the C.F.A. suggested an insulting lack of confidence in Hong Kongers' abilities to staff their own legal institutions.<sup>180</sup> Nonetheless, some pro-democracy politicians and legislators viewed such factors as counting for little in light of a C.F.A. deal-making process that "made a mockery" of Legco's law-making powers,<sup>181</sup> and confined "all decisions" to "secret Sino-British negotiations" that went on "above Hong Kong people's heads"<sup>182</sup> and "treated the people of Hong Kong with contempt."<sup>183</sup> From this perspective, the prospects for the Court going forward into the S.A.R. period were equally bleak: the Court's delayed, post-reversion establishment meant that the democratically chosen representatives of the people would have no say in the selection of the first C.F.A. judges.<sup>184</sup> Instead, the undemocratic Provisional Legislature would confirm their nominations. More fundamentally, and especially troubling given the prospect of weak S.A.R. institutions, the Basic Law provisions

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<sup>178</sup> Linda Choy, *We Fear Losing Rule of Law, Martin Lee Tells U.S. Bar*, S. CHINA MORNING POST, Aug. 10, 1995, at 4; see also *Clauses Raise Worries on Human Rights After 1997*, *supra* note 163, at 5 (stating Martin Lee's concern that the C.F.A. might not be able to hear cases such as the arrest of a Hong Kong member of a local organization supporting democracy movements on the mainland).

<sup>179</sup> See Stacy Mosher, *Right of Rejection*, FAR E. ECON. REV., Oct. 31, 1991, at 13.

<sup>180</sup> See Stacy Mosher, *Local Justice*, FAR E. ECON. REV., Oct. 10, 1991, at 11-12.

<sup>181</sup> Stormont, *supra* note 149.

<sup>182</sup> Stephen Vines, *Patten Shrugs Off Motion of No Confidence*, INDEPENDENT (London), June 23, 1995, at 15.

<sup>183</sup> Stormont, *supra* note 149.

<sup>184</sup> See Ng, *supra* note 42, at 17; No Kwai-yan, *Fears Raised of Mouthpiece Risk to Judges*, S. CHINA MORNING POST, June 28, 1996, at 6 (describing the views of leading liberal lawyer Gladys Li).

conferring significant and seemingly "judicial" interpretive power on the N.P.C. foretold that "the voice of the people in Hong Kong would be excluded or ignored" on vital questions about how Hong Kong would be governed.<sup>185</sup>

Liberal and pro-democracy political leaders' assertion of links between the C.F.A. question and issues of rights and democracy, like their more narrowly focused arguments stressing the connections between the terms of the Court's creation and the preservation of the rule of law, also blended normative arguments rooted in a liberal-democratic vision of law and legality with arguments addressed to the people's positions on the concrete legal and institutional questions of the Court's composition, powers, and establishment. Officials of the British and Hong Kong governments did the same thing in pursuit of an opposite result. Both the colonial authorities and their antagonists among Legco members and local political leaders asserted that their positions on the proposed C.F.A. arrangement and its implications for other politically charged, rule-of-law-related issues were right, as well as actually or prospectively popular.

Although their shared normative principles were, thus, close to the surface in such arguments, the intramural rift among adherents to the broadly liberal democratic perspective persisted with respect to the concrete legal and institutional questions at issue. Thus, for example, Attorney General Mathews argued that the government should establish a Court in keeping with the 1991 accord even if China had offered no guarantees of continuity, for it was "clearly right, and clearly in the best interests of Hong Kong" and the Hong Kong people to do so.<sup>186</sup> Local liberals and democratic politicians countered that they hoped that Britain would forego choosing "what is expedient" over "what is right" and would establish a Court with the powers and personnel that liberal critics of the Sino-British C.F.A. deals thought were necessary and proper.<sup>187</sup> Martin Lee warned that Democrats would "not allow the British government to betray Hong Kong people" by acquiescing in the kind of practically and normatively inadequate Court deal that the colonial government and London

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<sup>185</sup> Louise do Rosario, *Papa Don't Preach*, FAR E. ECON. REV., Jan. 26, 1995, at 21.

<sup>186</sup> *Courting the Right Bill*, *supra* note 135, at 13.

<sup>187</sup> See *id.* (quoting a liberal solicitor); Lee, *supra* note 165, at A27.



were pushing the Hong Kong people to accept.<sup>188</sup>

2.2.4. *The Chief Executive: (Un)democratic Selection, Substantive Positions, and "Representing Hong Kong"*

Although the split was less acrimonious and dramatic than in the context of the conflict over the Court of Final Appeal, British and colonial officials and liberal and democratic politicians in Hong Kong also differed over the views that the Hong Kong people held or should hold concerning the selection of the first Chief Executive for the S.A.R. Legislators from the Democratic Party, their pro-democracy independent colleagues, and liberal commentators attacked the selection process and its outcome as undemocratic and unpopular. These critics pointed out that official Chinese sources had made clear that China would not tolerate any surprises in the process and would insist on a candidate acceptable to Beijing.<sup>189</sup> They stressed that China had summarily dismissed the idea of selecting the Chief Executive by universal suffrage in Hong Kong, which some Legco democrats had urged.<sup>190</sup> Commentators routinely noted that pro-China politicians dominated the Selection Committee that chose a nominee for appointment as Chief Executive by the Central People's Government in Beijing. In addition, these commentators also noted, the Selection Committee's nominal choice was from among a handful of candidates on a short-list that P.R.C. officials had developed.<sup>191</sup> Hong Kong liberals saw further evidence of

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<sup>188</sup> Yeung et al., *supra* note 138, at 1.

<sup>189</sup> See, e.g., Bruce Gilley, *Playing Favourites*, FAR E. ECON. REV., Feb. 8, 1996, at 22-23 [hereinafter Gilley, *Playing Favourites*] (describing the secretive search process for candidates conducted under the auspices of Xinhua's Hong Kong branch, and quoting pro-China and China-connected business leaders' comments that China's preferences would weigh heavily in the Chief Executive's selection); Bruce Gilley, *The Common Touch*, FAR E. ECON. REV., Nov. 21, 1996, at 34 [hereinafter Gilley, *The Common Touch*] (quoting P.R.C. Hong Kong and Macao Affairs Office Deputy Director Wang Fengchao's statement that "[t]here will not be any more major tremors" in the Chief Executive selection process, and describing Beijing's role in rejecting potential candidates).

<sup>190</sup> See, e.g., Emily Lau, *Fight for Universal Suffrage Continues*, S. CHINA MORNING POST, Feb. 5, 1996, at 18 (presenting the comments of the pro-democracy legislator).

<sup>191</sup> See, e.g., Frank Ching, *Split in Beijing over Hong Kong*, FAR E. ECON. REV., Apr. 13, 1995, at 34; Gilley, *The Common Touch*, *supra* note 189, at 34;

the closed and predetermined nature of the selection process in the event that Hong Kongers perceived to be the determinative public signal of Tung Chee-hwa's selection for the post. By singling out Tung for the first handshake among a delegation of Hong Kongers in Beijing, Chinese Party chief Jiang Zemin was, in pro-democracy legislator Emily Lau's words, "using his body language to tell us all to shut up" months before the Selection Committee was to vote.<sup>192</sup>

According to the liberal critics, attempts by China, its Hong Kong allies, and others to portray the process as democratic and reflective of the views of the Hong Kong people were unconvincing and even preposterous. One columnist asserted that "no one in Hong Kong today believes that Hong Kong people will be able to choose their chief executive."<sup>193</sup> In Emily Lau's assessment, efforts to portray a genuinely contested race were "a slap in the face to the people of Hong Kong, who kn[e]w full well that they [would] have no say over the choice of Chief Executive."<sup>194</sup> When the Selection Committee met to choose Tung, it was, Lau added, a sham election in which the people of Hong Kong had been "denied the right to self-determination and democracy."<sup>195</sup>

The liberal critics' claim that the people were unhappy with the selection process found some support in a variety of indicators of popular preference. The group of nominees considered by the Selection Committee conspicuously omitted Chief Secretary Anson Chan, who routinely finished ahead of all others in surveys of public opinion, but who had an apparently disqualifying history of spats with Beijing and especially strong ties to the British colonial administration.<sup>196</sup> Moreover, public opinion polls found considerable popular dissatisfaction with the process

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Emily Lau, *What Race for Chief Executive?*, WALL ST. J. (Europe), Sept. 12, 1996, at 6.

<sup>192</sup> Gilley, *Playing Favourites*, *supra* note 189, at 34.

<sup>193</sup> Frank Ching, *China Interfering in Hong Kong*, FAR E. ECON. REV., Dec. 28, 1995 & Jan. 4, 1996, at 31.

<sup>194</sup> Lau, *supra* note 191.

<sup>195</sup> Choo, *supra* note 119, at 3 (quoting Emily Lau). A no-confidence motion offered against the new Chief Executive-designate was supported by most Legco liberals but fell short of a majority. *See id.*

<sup>196</sup> For reports of some of the many polls showing Anson Chan easily outdistancing the field of actual and potential candidates, see, for example, *Lo Tak-shing Seeks To Govern in Hong Kong*, WALL ST. J., Aug. 5, 1996; *The Trials of Martyr Lee*, FAR E. ECON. REV., June 27, 1996, at 5.

used to choose the S.A.R.'s first leader.<sup>197</sup> Still, even ardent democrats recognized that widespread disaffection did not automatically generate meaningful popular pressure to correct or ameliorate perceived deficiencies or their consequences. Generally, liberal critics' frequent assertions that the Chief Executive selection process was undemocratic and excluded the people seemed meant to rouse the people to anger, not merely to reflect their established discontent. Seemingly conceding that existing public sentiment might provide inadequate support for the liberals' and democrats' positions, Emily Lau stated that the people of Hong Kong "may be too smart to fall for" so "blatant [a] ploy" as Beijing's claim to provide democracy, but they still needed to "learn that they have to assert themselves if they want to have some say over their destiny."<sup>198</sup>

Although they shared liberal and pro-democracy politicians' conclusion that a highly undemocratic method for selecting the Chief Executive would run afoul of popular interests and preferences in Hong Kong, the territory's departing colonial masters had no desire to pursue an agenda of persuading the people to offer more assertive opposition to the process and its outcome. Compared to Legco liberals and democrats, British authorities struck a less confrontational stance and presented a more modest account of the people's desires and the requirements of an adequate selection process. The Hong Kong government had pledged early on to cooperate with a Chief Executive-designate to be chosen under the framework set forth in the Basic Law.<sup>199</sup> Indeed, Patten had urged an early selection of an occupant for the post in order to permit a smoother and more orderly transition and resolution of legal and other issues of concern to Hong Kongers.<sup>200</sup> Moreover, a colonial administration that could not claim a democratic mandate from Hong Kongers for its top officials was in a poor position to do more

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<sup>197</sup> See, e.g., *Rule of Law, Autonomy Top Post-'97 List, Survey Shows*, S. CHINA MORNING POST, Oct. 28, 1996, at 5 (finding one-third of respondents saying that the selection process was fair and an equal share saying it was unfair).

<sup>198</sup> Lau, *supra* note 191.

<sup>199</sup> For a restatement of that position on the eve of the selection, see *The Policy Address*, S. CHINA MORNING POST, Oct. 3, 1996, at 4 (providing a text of Governor Patten's final annual policy address).

<sup>200</sup> See Gilley, *supra* note 116.

than to press temperately the notion that the selection process should not disregard democratic norms and the views of the people. Patten expressed "hope that the process of selection," conducted under the framework China had put in place, would be "as open, fair, and broadly based as possible." Patten explained that a process that fell short of this standard would lead many to "wonder with some justice what all the fuss has been about," and would leave Hong Kong with a Chief Executive who likely would lack public credibility, popular support, and the loyalty of the Hong Kong people. Such a result, the governor cautioned, would be neither well-received in Hong Kong nor sensible for Beijing.<sup>201</sup>

Recognizing that they had little hope of altering the selection process or affecting its outcome, Hong Kong liberals and pro-democracy politicians focused on how the people might view Tung Chee-hwa's use of the office. They sought to rally popular sentiments that would press Tung Chee-hwa to pursue policies that liberals and democrats saw as acceptable. They argued that Tung's embrace of the P.R.C.'s positions on the key legal-institutional issues of the endgame was making Hong Kong people worried and disaffected and leaving Tung without vital popular support. Specifically, Emily Lau argued that the process that yielded Tung's appointment had "left Hong Kong people feeling powerless and alienated" and "with the sagging feeling that Hong Kong's free lifestyle and the rule of law will be undermined after China takes over."<sup>202</sup> Adherents to this line of argument asserted that Tung's early actions as Chief Executive-designate were convincing the people that the "sagging feeling" was well-founded. They claimed that Tung's support for cutting back the Bill of Rights and overturning late colonial amendments to civil and political liberties legislation abruptly ended Tung's "honeymoon period with the Hong Kong people" and showed him to be a "mouthpiece of Peking."<sup>203</sup> One liberal commentary concerning the same issue maintained that Tung was "ignoring the wishes of the general public" when he endorsed proposals to roll back

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<sup>201</sup> Fung Wai-kong, *Patten Pushes Open Selection*, S. CHINA MORNING POST, July 29, 1996, at 4.

<sup>202</sup> Lau, *supra* note 191.

<sup>203</sup> Lau, *supra* note 53; see also Ng, *supra* note 42, at 17 (noting a decline in Tung Chee-hwa's popularity).

changes to the Public Order and Societies Ordinances.<sup>204</sup> Other liberal and democratic politicians and commentators added that Tung's endorsement of the Provisional Legislature also severely undercut his standing with the people.<sup>205</sup>

These critics of the Chief Executive-designate's early use of his future office noted visible indications of public sentiment. One prominent commentator pointed to the storm of criticism that attended Tung's censure of Martin Lee for attacking Tung's views on individual rights and the legislature. The commentator suggested that this showed that Tung had failed to perceive "people's underlying fears about the future" and therefore "may have underestimated the public reaction to his remarks."<sup>206</sup> Polls and conventional wisdom indicated that the values critics claimed Tung was endangering ranked extremely high on Hong Kong people's lists of what they wanted the Chief Executive to help preserve.<sup>207</sup> Liberals and democrats were quick to point out that Tung's popularity did sink noticeably in the wake of his pronouncements on controversial legal issues of the endgame, and to assert that a "silent majority" of Hong Kongers might be more critical of Tung than his relatively strong approval ratings seemed to suggest.<sup>208</sup>

Prominent liberal and pro-democracy politicians and like-minded commentators pressed Tung not to pursue ill-conceived and unpopular positions on key legal and institutional questions. They urged him to represent the interests of the Hong Kong people and to act as if he were the properly elected leader of the territory's citizens. Thus, Martin Lee called on Tung "to change

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<sup>204</sup> Sharon Cheung & Angela Li, *Protestors Tell Tung To Make Public Apology*, S. CHINA MORNING POST, Mar. 5, 1997, at 6.

<sup>205</sup> See, e.g., Linda Choy, *Hong Kong Backs Shadow Body, Says Tung*, S. CHINA MORNING POST, Dec. 22, 1996, at 1; Peter Humphrey, *Hong Kong Hit by Handover Quarrels*, Reuters, Feb. 13, 1997, available in LEXIS, Asiapc Library, Allasi File (describing criticisms of Tung by Martin Lee and the Democratic Party); Ng, *supra* note 42, at 17.

<sup>206</sup> Fanny Wong, *Reaction to Censure Reflects Concern*, S. CHINA MORNING POST, Feb. 19, 1997, at 14.

<sup>207</sup> See *Rule of Law, Autonomy Top Post-97 List, Survey Shows*, *supra* note 197 (showing that 90% of respondents identified judicial independence and Hong Kong's autonomy as top priorities and 87% cited freedom of speech and expression).

<sup>208</sup> See, e.g., Ng, *supra* note 42; *Popularity of Future HK Leader Hits New Low — Poll*, Reuters, Apr. 13, 1997, available in LEXIS, Asiapc Library, Allasi File; Wong, *supra* note 61, at 14, at 17.

the unhappy fate that awaits Hong Kong" and to press China to reconsider its decision to disband a legislature that enjoyed popular support and had been popularly elected.<sup>209</sup> Emily Lau argued that "[i]nstead of" accepting the Chief Executive's "following the Chinese government's pronouncements rigidly" on the Bill of Rights and other legal matters, "Hong Kong people expect Mr. Tung to look at such proposals objectively and then to urge Peking to respect local public opinion."<sup>210</sup> Commenting before Tung's formal selection, pro-democracy, independent legislator Christine Loh stressed that the Chief Executive had to appear "unequivocally to be acting in Hong Kong's interest." Loh explained that this required being accountable to the people of Hong Kong as well as to Beijing, and "tak[ing] the territory's side if need be" to preserve the elected legislature and to protect against the watering down of the Bill of Rights, which enshrined the freedoms that "the public treasures."<sup>211</sup> With such arguments, the territory's leading liberal and pro-democracy politicians again seemed to seek to do more than to tap existing popular opinion to support their position on the legal-institutional issue immediately at hand. By linking aspects of the Chief Executive question with the fate of other rule-of-law-related values that seemed to have strong popular appeal, they sought also to cultivate strong backing among the people that their positions on the Chief Executive question, more narrowly defined, might not otherwise attract.

Committed to working with the incoming Chief Executive to achieve an orderly transfer of governmental authority and apparently disinclined to engage in another fruitless confrontation with the P.R.C. over legal and institutional issues, British and colonial officials took a much less forceful and expansive line than the territory's pro-democracy politicians. For example, following the N.P.C.'s vote to reject portions of the Bill of Rights and other rights-protecting legal changes of the 1990s, Patten did not move immediately to portray Tung's acceptance of the outcome as a potentially decisive indication of the character of Tung or his office. Rather, Patten urged Tung to consult openly with the

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<sup>209</sup> Humphrey, *supra* note 205.

<sup>210</sup> Lau, *supra* note 53.

<sup>211</sup> Christine Loh, *Local Interests Must Take Priority*, S. CHINA MORNING POST, Aug. 12, 1996, at 18.

people before introducing new local legislation on civil and political liberties.<sup>212</sup> Similarly, on the eve of a visit to the territory, British Foreign Secretary Rifkind was markedly cautious and sympathetic to Tung's predicament, noting that Tung's handling of the controversy surrounding the rights laws controversy was "bound to be a very difficult and controversial task" that would make it "difficult" for Tung to "please all of the people."<sup>213</sup> Rifkind hoped that Tung's consultation with Beijing "could reduce the damage caused by the repealing of these ordinances."<sup>214</sup>

At least implicitly, the arguments from both wings of the divided liberal-democratic camp also intermingled claims about what was right and just with claims about what was actually or prospectively popular. When Hong Kong's most ardently liberal and pro-democracy politicians focused many of their initial criticisms of the Chief Executive selection process on issues of democratic legitimacy, and when they linked their arguments concerning the early use of the office-to-be with the normatively charged conflicts over the fate of the Bill of Rights, democratic reforms for Legco and more diffuse notions of representative government, they were making the Chief Executive issue a part of the broader debate about what a just and proper legal and institutional order required. While this feature was more prominent, and at times explicit, in the analyses and assertions of legislators, activists and commentators who were highly critical of the selection process and its aftermath, it was also present in the arguments of British and colonial officials. In accepting or defending the selection process and its results, the governments in Hong Kong and in London were hardly prepared to dispute that norms of democracy, liberty, and autonomy were, in some form, right for Hong Kong and important to Hong Kongers. They and their critics in Legco and among Hong Kong's liberal political circles openly parted company only with respect to the narrower and more concrete questions of what arrangements relating to the office of Chief Executive were required by those normative

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<sup>212</sup> See Fung Wai-kong, *Patten Fears for Freedom*, S. CHINA MORNING POST, Feb. 25, 1997, at 4.

<sup>213</sup> Greg Torode & Duncan Hughes, *Qian Sticks to His Guns in Final Meeting with Rifkind*, S. CHINA MORNING POST, Feb. 15, 1997, at 1.

<sup>214</sup> *Id.*

principles, backed by extant or plausibly emerging popular demand, and permitted by transitional Hong Kong's circumstances.

2.3. *The Hong Kong People and the China and pro-China Hong Kong Vision of the Rule of Law*

During the 1990s, Chinese officials and pro-China elements in Hong Kong accepted that the rule of law was important to the people of Hong Kong. Official Chinese and pro-China statements assured the Hong Kong people that the S.A.R. would provide a rule of law adequate for the citizenry of the territory. China repeatedly stressed, especially in response to charges that some P.R.C. moves imperiled vital legal and institutional arrangements, that Hong Kong's rule of law would survive the territory's reversion to Chinese rule. For example, Hong Kong and Macao Affairs Office Director Lu Ping explained that the Chinese government was well-prepared to effect a smooth transition in Hong Kong's rule-of-law system, one that would keep Hong Kong's laws "entirely different" from those of the mainland.<sup>215</sup> Similarly, Prime Minister Li Peng declared that the territory's rule of law would remain unchanged after July 1, 1997.<sup>216</sup>

While top official P.R.C. sources rarely went much further, some pro-China Hong Kong sources more openly expressed an appreciation of the rule of law's importance to the people of Hong Kong. For example, Cheng Kai-nam, a leader of the Democratic Alliance for the Betterment of Hong Kong ("D.A.B."), said that the rule of law was a vital part of what would "bring about a better tomorrow" for Hong Kong.<sup>217</sup> D.A.B. leader Tsang Yok-sing, an often-quoted source for pro-China views, commented that "[t]he importance of upholding the rule of law [in Hong Kong] cannot be over-emphasized."<sup>218</sup>

Chinese officials and their allies in Hong Kong did not promise the same rule of law, however, that Hong Kong's liberal or pro-democracy politicians, or its colonial masters, asserted that

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<sup>215</sup> See Lu Ping *Reiterates China's Policy on Hong Kong*, Xinhua, June 18, 1996, available in LEXIS, Asiapac Library, Allasi File.

<sup>216</sup> See *id.*

<sup>217</sup> Cheng Kai-nam, *Need for Confidence*, WINDOW, Sept. 27, 1996, at 16.

<sup>218</sup> Tsang Yok-sing, *Prophets of Doom Shooting HK in Foot*, S. CHINA MORNING POST, Feb. 11, 1997, at 14.



the people of Hong Kong wanted or needed. China and its closest supporters in the territory did not accept that a rule of law for Hong Kong had to satisfy substantively liberal notions of a just and good legal order, or could disregard the limits that the Basic Law imposed. Rather, they envisioned the rule of law as a set of specific arrangements that the Chinese sovereign and its delegate, the S.A.R. government, would provide through proper exercises of discretionary sovereign authority, prudentially taking into account the preferences and interests of the Hong Kong people.

Many of the key provisions of the Basic Law embodied this positivist conception. The promised continuity in Hong Kong's rule of law was to be provided to the Hong Kong people primarily by implementation of the Basic Law's undertakings to maintain Hong Kong's prior laws (including the common law) and judicial system, preserve Hong Kong's capitalist system, permit the extension of the territory's separate membership in international legal regimes, continue protection of the rights enshrined in the principal United Nations human rights covenants (which were applicable to colonial Hong Kong), and accord the territory a high degree of autonomy in legislative, executive, and judicial affairs (and thus the capacity to preserve legal continuity).<sup>219</sup>

Comments from pro-China sources reflected a similarly positivist perspective on Hong Kong's post-reversion legal order. D.A.B. leader Cheng Kai-nam explained that it was the Basic Law that would provide the necessary "protective talisman for [the] Hong Kong people against any injustice."<sup>220</sup> Cheng's colleague Tsang Yok-sing asserted that the task China and the S.A.R. government-in-waiting faced in answering doubts about the rule of law was primarily "to convince people that the Basic Law [would] be fully implemented."<sup>221</sup> Such comments suggested

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<sup>219</sup> See, e.g., Basic Law, *supra* note 21, arts. 8, 160 (concerning laws previously in force); *id.* art. 81 (concerning the maintenance of the judicial system); *id.* arts. 150-52 (concerning the U.N. human rights covenants); *id.* art. 5 (concerning the maintenance of the capitalist system); *id.* art. 2 (concerning the high degree of autonomy); Joint Declaration, *supra* note 39, art. 3; see also *id.* annex I, §§ I, II, III, VI, XI, XIII (concerning the high degree of autonomy, the maintenance of laws previously in force, the preservation of the judicial system, the capitalist system, international legal relations, and the applicability of standards set forth in the U.N. human rights covenants).

<sup>220</sup> Cheng, *supra* note 217, at 16.

<sup>221</sup> Tsang, *supra* note 218, at 14.

little interest in, or tolerance for, appeals to fixed principles of justice or sovereign obligation as measures of the propriety of specific legal or institutional arrangements for the S.A.R.

Especially at moments of heightened tension between China and British authorities or Hong Kong democracy activists, official Chinese statements hedged even on a commitment to a narrowly positivist vision, and suggested that a relatively robust rule of law might not be important to the people of Hong Kong. This tendency was especially pronounced in the comments of senior Beijing leaders with portfolios not limited to Hong Kong. For example, Chinese Politburo Standing Committee member Li Ruihuan pointedly refused to attribute Hong Kong's success to features the British had provided to the colony, including Hong Kong's rule of law. Indeed, Li argued that the British did not even "govern themselves very well" at home.<sup>222</sup> Party chief Jiang Zemin said more explicitly that the rule of law had little to do with Hong Kong's accomplishments.<sup>223</sup> Li and Jiang asserted that the key to the territory's success lay instead in the ability and energy of the Hong Kong people, which presumably could survive in the absence of many of the elements of the late colonial rule-of-law regime.<sup>224</sup> The D.A.B.'s Secretary General was more restrained in his analysis, but he nonetheless deemed the "special quality of the Hong Kong people" to be more important than the concededly significant rule of law in accounting for Hong Kong's remarkable prosperity and vitality.<sup>225</sup>

Suggesting a broadly similar skepticism about the need to preserve Hong Kong's prior rule of law, the pro-China press provided extensive and highly favorable coverage when China's choice for Chief Executive, Tung Chee-hwa, embraced a version of the "Asian values" theme in sketching his vision of Hong

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<sup>222</sup> *Text of Li Ruihuan's Remarks to Hong Kong and Macao Representatives to the Chinese People's Political Consultative Conference*, WEN WEI PO, Mar. 14, 1995, at B5.

<sup>223</sup> See Frank Ching, *Danger Signals for Hong Kong*, FAR E. ECON. REV., Oct. 17, 1996, at 36.

<sup>224</sup> See *id.*; *Text of Li Ruihuan's Remarks to Hong Kong and Macao Representatives to the Chinese People's Political Consultative Conference*, *supra* note 222, at B5.

<sup>225</sup> Cheng, *supra* note 217, at 16.

Kong's future.<sup>226</sup> Against the background of Singaporean senior leader Lee Kuan Yew's long-standing critique of Western-style rights-centered legality and after the Bangkok Declaration's more formal articulation of an Eastern challenge to allegedly Western human rights norms, "Asian values" had become a code word for the rejection of many of the principles underpinning the rule-of-law regime that Hong Kong's liberal and pro-democracy camp claimed Hong Kongers needed and wanted.<sup>227</sup> In rejecting Western criticisms and concerns, Tung seemed to be working within this framework when he commented, "We are going to find our own way forward, but it may not be the way you like."<sup>228</sup> Adopting this line of analysis, a leading pro-Beijing newspaper in the territory quoted Tung's statements extensively and endorsed the view that a legal order in line with Hong Kong's unique and substantially Chinese culture and values would be in accord with the true preferences of the Hong Kong people and would assure the territory's continued stability and prosperity. In both respects, this argument claimed, Tung's version of legality would be superior to the uncritical perpetuation of a colonial order.<sup>229</sup>

Confidence that the people would accept a species of legality that was less than what liberals wanted and was compatible with what China would countenance seems to have been high with respect to the major concrete legal and institutional issues of transitional Hong Kong's endgame. In these areas, China and its Hong Kong supporters argued, the colonial government and liberal politicians were trying to introduce changes that not only exceeded what China had authorized or would accept, but also went beyond what the people of Hong Kong had previously

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<sup>226</sup> See Philip Stephens, *One System Fits All*, FIN. TIMES, Jan. 31, 1997, at 14.

<sup>227</sup> See *id.*

<sup>228</sup> *Id.*

<sup>229</sup> See Tung Chee-hwa *Clarifies Seven Points of Misunderstanding, Stressed Hong Kong SAR Will Make Laws on Its Own*, TA KUNG PAO, Feb. 5, 1997, at A12 (presenting the Chief Executive-designate's description of Hong Kong as a "mature community" that could "choose values suitable to itself" and "need not copy" the West). For a contrary view from an independent legislator who frequently sides with the Democrats, see Christine Loh, *The Rights Stuff*, FAR E. ECON. REV., July 8, 1993, at 15 (arguing that indigenous Asian human rights movements refute the claims from the P.R.C. that human rights are "foreign" or "Western" concepts).

enjoyed and could be presumed to want or require. China's sense that, despite recent changes, Hong Kong's citizens remained economic creatures who would accept any system that continued to generate prosperity likely reinforced such views.<sup>230</sup>

2.3.1. *The Bill of Rights and the People's Values and Interests*

When the Bill of Rights Ordinance emerged to the agenda of Hong Kong politics, China and its allies made few public attempts to assert or to build opposition to the proposed Ordinance among the citizenry of Hong Kong. The colonial government, backed by Parliament, appeared committed to adopting a Bill of Rights. Popular distrust and dislike of the Beijing leadership were at peak levels in the wake of the Tiananmen Incident. The institutional mechanisms for nurturing and mobilizing mass public opinion beyond a core of loyal activists in Hong Kong were in an even weaker state on the pro-China left than they were on the government's and pro-democracy politicians' side.<sup>231</sup> China thus tended to content itself with clear signals of its views to sympathizers and warnings to prospective antagonists, via statements of Beijing's opposition to the Ordinance and its intention to overturn legal changes that it considered to be in conflict with the Basic Law's requirements.<sup>232</sup> Beyond this, a few pro-China members of Legco cautioned that the proposed Ordinance was not adequately understood by the Hong Kong people and would provoke an undesirable and ultimately unpopular confrontation

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<sup>230</sup> See Gilley, *supra* note 59, at 16.

<sup>231</sup> See, e.g., Gilley, *supra* note 24, at 72, 76 (describing belated moves to establish a united front group to win over younger Hong Kongers who have little experience or trust in the mainland); Emily Lau, *Peking's Tune*, FAR E. ECON. REV., Aug. 23, 1990, at 22 (describing the struggles of fledgling pro-China parties founded in response to new pro-democracy groupings); Stacy Mosher, *Liberal Landslide*, FAR E. ECON. REV., Sept. 12, 1991, at 19 (describing the rout of pro-China candidates in elections for Legco held a few months after the enactment of the Bill of Rights).

<sup>232</sup> See, e.g., Zhang Junsheng *Stresses PWC Opinion on Bill of Rights Reasonable and Legitimate*, WEN WEI PO, Oct. 21, 1995, at A1 (describing the Chinese Foreign Ministry's "solemn statement" in 1991 expressing China's disagreement with the colonial government's action and stating that China reserved the right to take corrective action in the future).

with China.<sup>233</sup> Official P.R.C. sources later derided the colonial government for having ignored considerable opposition in Hong Kong at the time of the Ordinance's enactment.<sup>234</sup>

As 1997 drew nearer, China clarified its plans to reverse some key Bill of Rights provisions and amendments to the Societies and Public Order Ordinances, which previously had imposed restrictions on political activities and organization. At the same time, the P.R.C. and its Hong Kong allies developed more elaborate arguments concerning support among the people of Hong Kong for Chinese and pro-China positions on the threatened rights legislation.

One principal argument simply asserted that the masses had no great or deep-seated love for the laws in question. Proponents of this argument could point to a variety of indicators suggesting that such a claim was plausible. As early as 1991, popular enthusiasm for the human rights agenda had begun to wane in the wake of China's opposition to the Bill of Rights and other legislation.<sup>235</sup> In 1994, three courses on human rights at Hong Kong's top university had to be dropped due to low enrollment.<sup>236</sup> At times, liberal defenders of the Bill of Rights and other legislation had to scramble, claiming support from a "silent majority"<sup>237</sup> or desperately urging people to defend their rights.

China and pro-China sources argued further that apparent popular support for the Bill of Rights and other civil liberties laws was the product of the colonial authorities and others having duped the Hong Kong people. Specifically, the pro-China newspaper *Ta Kung Pao* explained, "Some people . . . affected by Chris Patten . . . wrongly think" that repealing amendments to the Societies Ordinance and Public Order Ordinance will affect residents' freedom or that post-reversion legal limits on subversive

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<sup>233</sup> See Emily Lau, *Better Late than Never*, FAR E. ECON. REV., July 12, 1990, at 16.

<sup>234</sup> See Linda Choy, *Qian Maps Out Legality of Power*, S. CHINA MORNING POST, Mar. 10, 1997, at 1 (quoting Vice Premier Qian Qichen).

<sup>235</sup> See Stacy Mosher, *Selective Suffrage*, FAR E. ECON. REV., Aug. 29, 1991, at 17 (quoting human rights activist Ho Hei-wah).

<sup>236</sup> See Linda Choy, *Courses on Human Rights Dropped Due to Student Apathy*, S. CHINA MORNING POST, June 27, 1994, at 3.

<sup>237</sup> See *supra* note 61 and accompanying text.

"advocacy" would place freedom of speech under siege.<sup>238</sup> More generally, proponents of this line of argument asserted that the government and sympathetic media had misled the Hong Kong people into holding unfounded fears that their liberties were in danger, and offering ill-considered support for positions on the Bill of Rights and related matters that departed from the people's true beliefs, as well as their interests.<sup>239</sup>

As the attacks on Patten and others for misleading and confusing the people underscored, China and its allies perceived that there was considerable, albeit misplaced, support for the Bill of Rights Ordinance and related legal reforms. Their arguments thus sought to pressure the people to accept pro-China positions, not just to proclaim their existing preferences and to bring those preferences to bear in the conflict over rights laws. Even seemingly descriptive statements about popular attitudes had some of this character. When official Chinese sources and Hong Kong sources with strong China ties claimed that the people were not strongly attached to late colonial rights legislation or that the people would abandon their current attachments after a little reflection on their deeper values and interests, the expected and intended effect was to erode existing popular support for those laws. By sending clear signals of China's displeasure with the existing laws and its intention to demand changes to them, such

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<sup>238</sup> *Tung Chee-hwa Says that Proposals of Legal Subgroup Are Good*, TA KUNG PAO, Jan 24, 1997, at A2; see also *If the British Side Knew This Would Happen, It Should Not Have Done It in the Beginning*, *supra* note 50, at A2 (asserting that the Preparatory Committee proposal urging the N.P.C. Standing Committee to "restore old laws" was a "deliberate act taken to mislead the public"); *Tung Chee-hwa's Remarks Are Beneficial to Hong Kong's Prosperity*, WEN WEI PO, Feb. 14, 1997, at A4 (deriding British Foreign Secretary Rifkind's remarks "accus[ing] the S.A.R. of repealing the Bill of Rights Ordinance" as "aimed at maliciously misleading the public" into thinking that "there are no more civil rights in Hong Kong"); *Why Does Chris Patten Advocate "Freedom of Advocacy?"*, TA KUNG PAO, Oct. 22, 1996, at A2 (stating that "because Patten has continued to mislead the people . . . some people have misgivings" about questions of freedom of speech in post-reversion Hong Kong).

<sup>239</sup> See, e.g., Andy Ho, *Jitters over the Media*, S. CHINA MORNING POST, Nov. 3, 1995, at 19 (describing the remarks of Hong Kong Xinhua Deputy Director Zhang Junsheng); Sun Chengbin, *Behind the Banner of "Human Rights"*, Xinhua, Oct. 27, 1995, available in LEXIS, Asiapc Library, Allasi File (commenting on the storm over Hong Kong's Bill of Rights); Chris Yeung, *The War over Sir Ti Liang's Words*, S. CHINA MORNING POST, Nov. 18, 1995, at 17.

statements seemed designed to achieve acquiescence from a populace that was thought to be reluctant to seek confrontation with China, especially when there seemed to be little hope of altering outcomes. Other arguments from China and Hong Kong's pro-China elements more transparently aimed to pressure and persuade the people, often by portraying the impact that revising, or failing to revise, rights laws would have on the realization of other values that the Hong Kong people held dear.

Thus, China and pro-China sources tried to appeal to the assumed popular desire for order and stability. They argued that leaving some of the eleventh-hour colonial amendments in place was a formula for chaos. The Societies Ordinance and Public Order Ordinance that the British sought to impose on the S.A.R. would make it "difficult to maintain the social order and social stability."<sup>240</sup> Reversing the recent changes would be beneficial in "guaranteeing the freedoms of the majority of the people" of Hong Kong.<sup>241</sup> Left unrevised, the Bill of Rights Ordinance would not "guarantee Hong Kong people's rights . . . but rather [would] disrupt Hong Kong's social stability."<sup>242</sup> Its "arbitrary application" would pose "a direct threat to . . . the security of the Hong Kong people."<sup>243</sup> Indeed, on this view, the Bill of Rights' attempt at super-legislative entrenchment of vague individual rights was "crippling Hong Kong's existing legal system" and threatened to create a safe haven for criminals who would be free to disrupt the safe and peaceful society that the people of Hong Kong valued.<sup>244</sup>

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<sup>240</sup> *Tung Chee-hwa Says that Proposals of Legal Subgroup Are Good*, *supra* note 238, at A2.

<sup>241</sup> *Id.*

<sup>242</sup> *Zhang Junsheng Stresses PWC Opinion of Bill of Rights Reasonable and Legitimate*, *supra* note 232, at A1; see also Fanny Wong, *No Way for China To Win Hearts and Minds*, S. CHINA MORNING POST, Nov. 1, 1995, at 14 (noting similar comments from a visiting delegation of P.R.C. legal experts in Hong Kong).

<sup>243</sup> *Hong Kong Newspaper Says Bill of Rights Disturbs Legal System*, WEN WEI PO, Nov. 11, 1995, at A2, translated in BBC Summary of World Broadcasts, Nov. 21, 1995, available in, LEXIS, Asiapc Library, Allasi File.

<sup>244</sup> See *Zhang Junsheng Stresses PWC Opinion of Bill of Rights Reasonable and Legitimate*, *supra* note 232, at A1; see also *Hong Kong Newspaper Says Bill of Rights Disturbs Legal System*, *supra* note 243, at A2 (stating that many people feared that the Bill of Rights would "totally destroy" Hong Kong's legal and judicial systems); So Lai-fun & Connie Law, *Right Bill Aids "Bad Guys"*, S. CHINA MORNING POST, Nov. 8, 1993, at 1 (quoting Hong Kong and Macao

China and its allies supplemented this effort to play on the people's fear of disorder with an attempt to play the nationalism card. In its favorable reporting on the Chief Executive-designate's views and in its own comments, the pro-China Hong Kong press argued that the Societies Ordinance, as amended by the colonial authorities, would permit Hong Kong political organizations to become the agents of foreign forces.<sup>245</sup> Official Chinese sources also attacked the Bill of Rights by asserting that it would "open room for the activities of international anti-China forces and the agents of the British side after 1997."<sup>246</sup> These were potentially powerful appeals in light of the considerable anti-colonial sentiments and welling sense of national pride that had taken hold among Hong Kongers, including those who generally distrusted the P.R.C. As independent legislator and prominent columnist Margaret Ng observed, "[E]voking the Chinese identification" in Hong Kong was "a great political weapon." It was possible, Ng elaborated, to stifle "reasonable discussion" and audible dissent in Hong Kong by recasting issues in a patriotically provocative form. Thus, a question such as, "Would you like to have the P.R.C. govern Hong Kong?" yielded answers more appealing to China and its supporters once the inquiry was rephrased as, "Should China have sovereignty over Hong Kong?"<sup>247</sup>

Seeking to appeal to other aspects of Hong Kongers' emergent sense of identity, pro-China voices in Hong Kong asserted that the rights laws China favored would better reflect the "shared values" of the people of Hong Kong.<sup>248</sup> The pro-China press quoted, and endorsed, Tung Chee-hwa's description of a markedly Confucian-sounding set of Hong Kong values that had developed from

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Affairs Office chief Lu Ping's criticism of the side effects of the Bill of Rights).

<sup>245</sup> See *Tung Chee-hwa Says that Proposals of Legal Subgroup Are Good*, *supra* note 238, at A2.

<sup>246</sup> Gilley, *supra* note 56, at 36.

<sup>247</sup> Margaret Ng, *Cultural Pride of the Hong Kong Chinese*, S. CHINA MORNING POST, Aug. 25, 1983.

<sup>248</sup> See *HK's New Chief Spells Out What Is Needed To Move Forward*, STRAITS TIMES (Singapore), Dec. 24, 1996, at 20; see also *Balancing Act over First Big Decision*, S. CHINA MORNING POST, May 17, 1997, at 17 (noting Tung's description of "trust, love and respect for our family and our elders; integrity, honesty and loyalty towards all; commitment to education; a belief in order and stability; an emphasis on obligations to the community rather than rights of the individual; a preference for consultation rather than open confrontation" as shared Hong Kong values).



a unique mix of Chinese and Western influences.<sup>249</sup> Rolling back excessively liberal provisions in late colonial legislation, pro-China commentaries on Tung's remarks continued, would allow Hong Kong to achieve "the right balance" between the rights of the individual and the "interests of the entire community,"<sup>250</sup> and a set of laws better suited to the Hong Kong people.

Finally, in seeking to shape popular attitudes toward the Bill of Rights and related legal issues, proponents of China's position also turned to the basic positivist principles that underlay the China and pro-China side's approach to the legal and institutional questions of the endgame. According to this line of argument, the positivist guarantees of citizens' liberties that P.R.C. and S.A.R. laws would provide would be enough for the territory's residents, even if there was considerable popular support in Hong Kong for the substance of the Bill of Rights and other legislation that was slated for reversal. As a leading pro-China daily phrased the argument, the "[f]reedoms of [the] Hong Kong people" would not be restricted" by planned legislative changes, for an elaborate framework of substantively similar laws would be in place.<sup>251</sup> Article 39 of the Basic Law and parallel undertakings in the Joint Declaration provided that the laws of the S.A.R. would retain the state's legal obligation to protect the rights set forth in the principal U.N. human rights covenants — the very same set of rights that the Bill of Rights Ordinance's substantive sections incorporated.<sup>252</sup> Indeed, these sources noted, the Basic Law also

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<sup>249</sup> See *id.* (providing excerpts of Tung's speech); see also *Tung Chee-hwa Clarifies Seven Points of Misunderstanding, Stressed Hong Kong SAR Will Make Laws on Its Own*, *supra* note 229, at A12 (quoting Tung Chee-hwa stating that "Hong Kong people know how to learn from the advantages of China and the West" and that Hong Kong was "nurtured" by both Chinese and Western cultures).

<sup>250</sup> *Tung Chee-hwa Says that Proposals of Legal Subgroup Are Good*, *supra* note 238, at A2.

<sup>251</sup> *Tung Chee-hwa Says that Proposals of Legal Subgroup Are Good*, *supra* note 238, at A2; see also *Jiang Enzhu Says Hong Kong SAR's Future Laws All Must Accord with the Basic Law*, WEN WEI PO, Oct. 19, 1995.

<sup>252</sup> See Basic Law, *supra* note 21, art. 39; Joint Declaration, *supra* note 39, art. 3(5), annex I, § XIII; Sun, *supra* note 239 (asserting that the Basic Law provided adequate human rights protection for the Hong Kong people); *Xinhua Official Says that Human Rights Commission Unacceptable to Chinese Side*, TA KUNG PAO, May 26, 1994, translated in BBC Summary of World Broadcasts, May 27, 1994, available in LEXIS, Asiapc Library, Allasi File (arguing that a human rights commission was unnecessary and inappropriate for Hong Kong).

specified additional rights.<sup>253</sup> In its laudatory coverage of Tung Chee-hwa's explanation of the S.A.R. government's agenda on rights issues, the pro-China Hong Kong press reported that these P.R.C.-provided laws, "stipulate[] that residents enjoy very extensive freedom," "fully guarantee[] human rights" for the territory's inhabitants, and reflect the Chinese government's "great respect for human rights in Hong Kong."<sup>254</sup>

In the end, pro-China sources added, there also would be adequate, positivist mechanisms to ensure that Hong Kongers' preferences were considered. Once the N.P.C. eliminated a narrow range of provisions that violated the Basic Law, the S.A.R. government — a government of Hong Kong people ruling Hong Kong — would use legislative and executive processes consistent with the Basic Law to determine the content of post-1997 Hong Kong laws governing individual rights and civil and political liberties.<sup>255</sup> Inevitably lurking beneath the surface of this last line of argument for persuading the people on the issue of rights laws was the less accommodating core of the China and pro-China perspective: Whether or not these claims about positivist guarantees persuaded the people, such guarantees were the only species of legal promise the people were going to get.

### 2.3.2. *The Patten Reforms, the Provisional Legislature, and the Popularity of Stability*

Faced with the colonial government's moves to accelerate democratic constitutional reform in Hong Kong, China and its allies in the territory responded with attempts to find and to foster popular support for their opposition to the reformers' agenda. Their methods for asserting and creating enthusiasm

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because the Basic Law already would provide adequate human rights protection for the Hong Kong people).

<sup>253</sup> See Basic Law, *supra* note 21, arts. 24-42.

<sup>254</sup> Tung Chee-hwa Says that Proposals of Legal Subgroup are Good, *supra* note 238, at A2; see also Linda Choy & Chris Yeung, Tight Police Controls on Protests, Ban on Political Group's Foreign Links Necessary for Social Order, S. CHINA MORNING POST, Jan. 24, 1997, at 1 (quoting Tung Chee-hwa as stating that the proposed changes to the Bill of Rights were only "technical in nature").

<sup>255</sup> See, e.g., If the British Side Knew This Would Happen, It Should Not Have Done It in the Beginning, *supra* note 50, at A2; Chris Yeung & Linda Choy, Preliminary Working Committee Adamant on Body to Run Territory, S. CHINA MORNING POST, Dec. 7, 1994, at 1.

among the people paralleled their approach to the question of popular attitudes toward the Bill of Rights and related issues. Their strategy also mirrored and sought to counter each of the main elements in the efforts of the colonial government and Hong Kong "pro-democracy" politicians to claim and to cultivate popular backing on democratic reforms.

With the memory of Tiananmen still fresh in the minds of the territory's residents, the P.R.C. and its allies made relatively limited public moves to claim a popular mandate for their opposition to rapid democratization at the beginning of the 1990s. Before Patten began to pursue in earnest his plans to reshape the electoral laws for the territory's representative bodies, China and pro-China voices in the colony remarked on the declining attendance at pro-democracy rallies,<sup>256</sup> sang the praises of the newly-adopted Basic Law (including its provisions concerning elections), and opined that the people of Hong Kong wanted only moderate reform to impose modest checks and balances on a government that they were content to see run by bureaucrats who proficiently pursued stability and prosperity.<sup>257</sup>

Once the Patten reforms were squarely on the political agenda, however, official Chinese and pro-China arguments about the attitudes of the Hong Kong people became more aggressive and elaborate. They claimed that the Patten proposals lacked popular support and that the people of Hong Kong embraced or at least accepted China's alternative arrangements. A leading pro-China newspaper asserted that "[t]he British side now suddenly wants to practice its 'democratization' programme" because it faced a declining and near-desperate "situation in Hong Kong [that] has gradually developed in favor of the Chinese side."<sup>258</sup> According to the pro-China view, Patten planned to "wage 'a public opinion war' . . . to force China to change the Basic Law" to make it

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<sup>256</sup> See, e.g., Emily Lau, *Backroom Betrayal*, FAR E. ECON. REV., Mar. 1, 1990, at 14-15 (noting a pro-China commentary's assertion of poor attendance at pro-democracy rallies).

<sup>257</sup> See *id.*; Mosher, *supra* note 235, at 17 (citing political analyst Lau Siu-kai on the electoral law reforms for the 1991 elections and his belief that they were compatible with popular preferences).

<sup>258</sup> Ta Ko, *Why Is the British Side 'Playing Rough' in the Games?*, WEN WEI PO, Nov. 1, 1992, at 11.

compatible with his plans for constitutional reform.<sup>259</sup> While the territory's new self-styled "democrats" might well back the Governor, their efforts would be to no avail. Patten and his allies would be unable to overcome "the growing discontent of the residents with the extremist opinions and actions of a small number of people" who supported such moves.<sup>260</sup> Official and pro-China media added that "people from all walks of life" were "criticizing,"<sup>261</sup> and "the masses of Hong Kong residents" were "resist[ing] and oppos[ing]," the Patten proposals shortly after their announcement.<sup>262</sup> "Outwardly," this line of argument continued, "Patten is trying to get more democracy for Hong Kong people, but, actually, his ill intent is obvious and known to all."<sup>263</sup>

As the P.R.C. and its most reliable supporters in the territory saw it, the enactment of the Governor's constitutional reform package was not convincing evidence of popular support. The Legco vote passing the Patten's proposals by a "slender majority," Vice Premier, Foreign Minister, and Preliminary Working Committee Chairman Qian Qichen contended, did not reflect the will of the majority of the Hong Kong people; to claim that it did was, simply, "a lie."<sup>264</sup> To the contrary, the more modest and gradual democratization that China had proposed in the bilateral talks on the Patten proposals "reflected the general wishes of the people of Hong Kong" and the fruits of China's consultations with Hong Kong people during the negotiations.<sup>265</sup> In the same

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<sup>259</sup> *A Policy Speech Unfavorable to Convergence*, WEN WEI PO, Oct. 8, 1992, at 1.

<sup>260</sup> *Id.*

<sup>261</sup> *Mr. Patten's Choice*, TA KUNG PAO, Oct. 18, 1992, at 2.

<sup>262</sup> *Xinhua's Zhou Nan Reaffirms Stance on Hong Kong*, New China News Agency, Domestic Serv., Mar. 18, 1993, transcribed in BBC Summary of World Broadcasts, Mar. 22, 1993, available in LEXIS, Asiapc Library, Allasi File (quoting Xinhua Hong Kong Director Zhou Nan).

<sup>263</sup> *A Political Gamble that Contravenes the Sino-British Joint Declaration and the Basic Law*, WEN WEI PO, Nov. 8, 1992 (quoting N.P.C. Standing Committee member Wu Dakun).

<sup>264</sup> Linda Choy, *Support for Reform 'a Lie'*, S. CHINA MORNING POST, July 8, 1994, at 1.

<sup>265</sup> *Text of Chinese Statement on the Breakdown of Sino-British Talks on Hong Kong*, Reuters, Mar. 2, 1994, available in LEXIS, Asiapc Library, Allasi File; see also Li Hsiao-ping, *Lu Ping Says Hong Kong People Have Full Say in the Political System Issue*, WEN WEI PO, May 6, 1993, at 12 (discussing the Hong Kong and Macao Affairs Office Director's description of the channels for collecting

vein, China and its allies claimed a popular mandate for the entity that China created in response to the Patten reforms and authorized to help lay the groundwork for replacing the Legco elected under the Patten reforms with a Provisional Legislature. They argued that the P.W.C. had "secured the approval, trust and support of many Hong Kong people [by] increasing communication with Hong Kong people" and "pool[ing] the wisdom of the masses."<sup>266</sup>

Official China and pro-China Hong Kong sources further asserted that the Hong Kong people supported the decision to set up a Provisional Legislature. At the body's first meeting, several months before reversion, Xinhua Hong Kong Director and Preparatory Committee Vice Chairman Zhou Nan told the members of the legislature-in-waiting, "The broad ranks of Hong Kong people have placed their trust and hopes in you."<sup>267</sup> "[S]upport from the majority" of the people of Hong Kong, Zhou had explained earlier, was a key source of the Provisional Legislature's authority.<sup>268</sup> Although such claims of popular enthusiasm might be open to doubt, the pro-China press insisted that the Hong Kong people had at least acquiesced in the outcome on the eve of the interim body's creation: "[T]he great majority of residents have expressed their understanding and acceptance of the establishment of the Provisional Legislature. Even those who were opposed to it have changed their position one after another and are willing to accept the reality of establishing the Provisional Legislature."<sup>269</sup> Other official Chinese and Hong Kong pro-

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popular input from the Hong Kong people amid Sino-British negotiations on political reform).

<sup>266</sup> *Fruitful Initial Preparatory Work*, RENMIN RIBAO, Dec. 9, 1995, at 5; see also *Agreement on Court of Final Appeal Embodies Results of Preliminary Working Committee Work*, WEN WEI PO, June 10, 1995, at A2 (asserting that "more and more . . . Hong Kong people" had "acknowledged" the "fruitful results" the P.W.C. had attained and the "important role" it would exercise in the transition).

<sup>267</sup> *Text of Zhou Nan's Speech to First Meeting of Provisional Legislature*, TA KUNG PAO, Jan. 26, 1997, at A2.

<sup>268</sup> Frank Zhang, *Rita Fan Elected President of Hong Kong's Provisional Legislature*, Agence France Presse, Jan. 25, 1997, available in LEXIS, Asiapc Library, Allasi File.

<sup>269</sup> *A Statement from the British Side Cannot Bar the Provisional Legislative Council*, TA KUNG PAO, Dec. 21, 1996, at A2; see also Linda Choy, *Hong Kong Backs Shadow Body, Says Tung*, S. CHINA MORNING POST, Dec. 22, 1996, at 1 (describing Chief Executive-designate Tung Chee-hwa's assertion that the Provi-

China sources added that the Hong Kong people would spurn opponents of the Provisional Legislature,<sup>270</sup> who would be "hard-pressed to face the people after 1997."<sup>271</sup>

China, with its allies and sympathizers in Hong Kong, found substantial indications of support for these outwardly confident assessments of popular opinion regarding democratization, the Patten reforms, and the Provisional Legislature. Official Chinese sources pointed to the apparent weakness of popular support for democratization. They cited a dismal turnout of less than one-half of the registered electorate and less than one-quarter of potential voters in the Legco elections that were held less than a year before Patten tabled his reform proposals.<sup>272</sup> These sources argued that, with so few citizens participating, the democrats' victory did not represent the "main trend of Hong Kong public opinion" which likely included a disproportionately non-voting majority more sympathetic to China's views.<sup>273</sup> As China and its Hong Kong supporters saw it, similar patterns of voter participation in the 1995 Legco elections suggested the same conclusions, as did public opinion polls that found relatively few citizens believed that Patten had the Hong Kong people's interests at heart when he pursued electoral law reforms.<sup>274</sup>

Despite their failure to deliver winning margins for pro-China candidates in Legco's most broadly elected constituencies, leftist

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sional Legislature was "accepted and supported" by the people of Hong Kong); *Unreasonable Demand Is Justifiably Rejected*, WEN WEI PO, June 13, 1997, at A4 (asserting that Hong Kong residents accepted and supported the establishment of the Provisional Legislature and citing a poll finding that half of the 40% of respondents who did not find the Provisional Legislature acceptable at first had changed their minds).

<sup>270</sup> See Gilley, *supra* note 112, at 31-32 (presenting *Wen Wei Po* comments on Martin Lee).

<sup>271</sup> Gilley, *supra* note 38, at 14-15 (quoting a statement from the P.R.C. State Council).

<sup>272</sup> See Chen Chien-ping, *Lu Ping Stresses Basic Law Cannot Be Amended Before 1997*, WEN WEI PO, Oct. 9, 1991; Mosher, *supra* note 81, at 19-20 (discussing P.R.C. comments on low voter turnout); Mosher, *supra* note 235, at 16 (commenting on low voter registration rates).

<sup>273</sup> Chen, *supra* note 272.

<sup>274</sup> See, e.g., *Battle for Hong Kong Opinion*, S. CHINA MORNING POST, Dec. 6, 1993 (describing opinion polls); do Rosario, *Sharp Distinction*, *supra* note 112, at 28-29; do Rosario, *supra* note 106, at 16 (concerning voter participation); Lau, *supra* note 111 (noting the low registration rate, particularly 37% in functional constituencies that formed the crux of the Sino-British dispute over the Patten reforms of electoral laws for Legco).

organizations, along with a variety of conservative groups that were willing to cooperate with Beijing, provided a considerable pro-China base in the battle over popular attitudes toward democratization and the legislature. The Hong Kong Federation of Trade Unions dominated organized labor and had been one of the territory's more formidable mass political institutions since well before the colonial government instituted democratic reforms.<sup>275</sup> Backed by Beijing and committed to participating in the elections mandated by late colonial electoral reforms, the pro-China Democratic Alliance for the Betterment of Hong Kong emerged as the territory's third most popular party.<sup>276</sup> Xinhua Hong Kong Director Zhou Nan claimed a still broader network of supportive organizations, saying that "[a] few hundred influential organizations from the industrial and commercial circles and labour circles, as well as people's organizations, political organizations and public figures" sided with China in the disputes over the Patten reforms.<sup>277</sup>

China and its Hong Kong allies also found visible indications of popular support for the Provisional Legislature. They pointed to "the fact that people of various circles have signed up for the election of the Provisional Legislature," and to the rise in opinion poll ratings for the body upon selection of its members.<sup>278</sup> They also deemed significant a long-term decline in Patten's popularity ratings that accompanied his protracted conflict with China over political reform legislation.<sup>279</sup>

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<sup>275</sup> See, e.g., Louise do Rosario, *Between Two Stools*, FAR E. ECON. REV., Sept. 14, 1995, at 26-27 (describing the Hong Kong Federation of Trade Unions).

<sup>276</sup> See *id.*; Peter Lim, *China Plans To Gather its Supporters To Form Provisional Legislature*, Agence France Presse, Apr. 8, 1996, available in LEXIS, Asiapc Library, Allasi File.

<sup>277</sup> Xinhua's Zhou Nan Reaffirms Chinese Stance on Hong Kong, Xinhua Domestic Service, Mar. 18, 1993, transcribed in BBC Summary of World Broadcasts, Mar. 22, 1993, at A1, available in LEXIS, Asiapc Library, Allasi File.

<sup>278</sup> *A Statement from the British Side Cannot Bar the Provisional Legislative Council*, *supra* note 269, at A2; Bruce Gilley, *Tung Sets the Course*, FAR E. ECON. REV., Jan. 9, 1997, at 22 (describing a poll showing a decline from a 46% to a 25% opposition to the Provisional Legislature and a rise in support to 37%).

<sup>279</sup> See *id.*; Louise do Rosario, *Down but Not Out*, FAR E. ECON. REV., July 27, 1995, at 27 (describing a fall in Patten's popularity from a nearly two-thirds favorable rating in July 1992 to a 54% favorable rating three years later, accord-

It was hard, however, even for the most ardent supporters of Beijing's line to ignore signs that the colonial government's and Hong Kong democrats' agenda for legal and constitutional reforms appealed to the public. A prominent N.P.C. member, for example, was reduced to a defensive argument acknowledging the force of democratic sentiments in Hong Kong while urging patience in pursuing democratic change: "As is known to all, China has consistently favored developing democracy in Hong Kong. However, people with even a glimmer of political knowledge know that a democratic political system cannot be developed overnight [and] should proceed from Hong Kong's actual reality."<sup>280</sup>

With election results, public opinion polls, and public demonstrations offering little evidence of firm or fervent mass backing for their positions on the Patten reforms, the Provisional Legislature and related matters, China and pro-China voices in Hong Kong advanced arguments that went beyond straightforward assertions that existing popular opinion weighed heavily in favor of the outcomes Beijing preferred. China and its allies sought to discount the significance of the popularity their opponents' positions enjoyed. They argued that it reflected their antagonists' ability to deploy unparalleled resources to manipulate the Hong Kong people and Hong Kong's political and legislative processes. The pro-China press contended that the British had deceived the people and won ill-founded support by claiming that Patten's political reform package conformed to the Joint Declaration, the Basic Law, and a series of Sino-British agreements.<sup>281</sup> These sources charged that Patten's argument that elections under his rules were essential to the rule of law and to the prevention of corruption in Hong Kong was an "exaggeration to scare people"

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ing to surveys conducted by the impartial *Ming Pao* newspaper).

<sup>280</sup> *A Political Gamble that Contravenes the Sino-British Joint Declaration and the Basic Law*, *supra* note 263 (quoting N.P.C. Standing Committee member Wu Dakun).

<sup>281</sup> See *Douglas Hurd Threatens To Push Unilaterally for Constitutional Reform*, WEN WEI PO, Oct. 3, 1993, at 2; see also *Noise in Policy Address*, TA KUNG PAO, Oct. 13, 1995, at A2 (charging Patten with "deceiv[ing] the people of Hong Kong on constitutional issues" by a variety of means, including his assertion that the 1995 elections represented the fulfillment of the Joint Declaration and were in conformity with the Basic Law).



into supporting the British plan.<sup>282</sup>

The pro-China indictment added that the colonial authorities had not been content to rely on such tactics of deception, but had also rigged the outcome so that they would win despite a lack of popular support. Pro-China sources claimed that the British side "let Patten draw up his package while leaving the Hong Kong people in the dark, then let the colonialist-manipulated Legco pass the package."<sup>283</sup> The colonial authorities then made ample use of their "unique techniques in forcing implementation of the Patten package and selectively exaggerating certain 'opinions' against convergence with the Basic Law."<sup>284</sup> In addition, official Chinese and pro-China sources charged that the elections held under the Patten rules were unfair, unreasonable, disorderly, and the subject of "many complaints."<sup>285</sup> In China's view, the 1995 polling could not be said to "truly reflect[] the will of the Hong Kong people."<sup>286</sup>

The China and pro-China side also argued that popular support for their positions and confidence in their promises, although possibly weak, would strengthen over time. For example, when Patten first outlined his reforms, the pro-China paper *Wen Wei Po* explained, "Maybe some Hong Kong people cannot see the harm of this practice for the time being, but, as time goes by, most Hong Kong people will see through its nature and make a cool-headed judgment and a correct choice."<sup>287</sup> Similarly, pro-China elements in Hong Kong maintained that while the idea of a Provisional Legislature initially might have enjoyed only limited backing from the ordinary people of Hong Kong, its creation and operation would boost popular confidence

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<sup>282</sup> Comment on Chris Patten's "Theory of Infiltration of Corruption," TA KUNG PAO, Oct. 27, 1993, at 2.

<sup>283</sup> *The Three-Tiered Structure Must Be Reorganized in 1997*, WEN WEI PO, Dec. 28, 1993, at 2.

<sup>284</sup> *Commenting on the British Cabinet Meeting*, WEN WEI PO, Nov. 11, 1993, at 2.

<sup>285</sup> No Kwai-yan and Simon Beck, *Legco Poll Not Will of the People*, China Says, S. CHINA MORNING POST, Sept. 20, 1995, at 6.

<sup>286</sup> Andrew Higgins, *The Vanishing Trick*, GUARDIAN (London), Sept. 19, 1995, at 17.

<sup>287</sup> *Just Keep a Watch over Mr. Chris Patten's Performance*, WEN WEI PO, Oct. 21, 1992, at 2.

in the arrangement.<sup>288</sup>

As these arguments showed, the P.R.C. and its Hong Kong agents and allies appreciated that it was important to build new backing, and not just assert existing support among the people for their positions on democratic reform and the legislature. They thus sought to convince the Hong Kong people to accept the decision to reject the Patten reforms and to "render great support to the . . . Provisional Legislature in discharging [its] responsibilities."<sup>289</sup> To a degree, the China and pro-China camp's nominally descriptive arguments also advanced the project of persuading the people. As was true in the debates over the Bill of Rights, official P.R.C. and pro-China Hong Kong statements that condemned the colonial government's constitutional reform package, underscored China's determination to reverse its effects, or praised Hong Kong groups that opposed extensive democratic changes, also sent clear and potentially effective signals to a populace that presumably would fear the possible adverse consequences, and foresee the likely futility, of active support for late colonial democratic reforms.

In P.R.C. and pro-China arguments that more obviously sought to create popular backing or acquiescence, a principal tactic was to link acceptance of the China and pro-China views on democratization and the legislature to the preservation of prosperity and stability that everyone thought the people of Hong Kong held dear. The pro-China press declared, in sweeping terms, "Hong Kong people who are born and grow up on this land all wish to maintain prosperity and stability in Hong Kong forever."<sup>290</sup> Similarly, Hong Kong and Macao Affairs Office head Lu Ping proclaimed that most of the Hong Kong people wanted stability, prosperity, and close cooperation with the central

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<sup>288</sup> See, e.g., *Fan Summarizes Work of Provisional Legislature as "Essential,"* MING PAO, Feb. 13, 1997, at A6 (quoting Provisional Legislature President Rita Fan); cf. *The 'Resolution' Shatters British Illusions*, WEN WEI PO, Sept. 1, 1994, at A2 (describing the N.P.C. Standing Committee's formal decision to reject bodies selected under the electoral laws as reformed by Patten and to authorize the Preparatory Committee to establish an interim legislature as moves that "will encourage the people of Hong Kong to cooperate with and support the Preparatory Committee").

<sup>289</sup> *Zhou Nan Urges Support for Tung*, S. CHINA MORNING POST, Feb. 18, 1997, at 4 (quoting Xinhua Hong Kong chief Zhou Nan).

<sup>290</sup> *Mr. Patten's Choice*, *supra* note 261.

authorities in Beijing.<sup>291</sup> In the same vein, Xinhua Hong Kong chief Zhou Nan asserted that the people wanted "stability, prosperity, [and] cooperation" with China.<sup>292</sup> Patten's reforms, according to this line of argument, put these popular aims profoundly at risk. Elaborating the argument, Zhou added that "[t]he great masses of Hong Kong compatriots" did not want Hong Kong to become "a center for political struggle."<sup>293</sup> Such a development "would ruin Hong Kong's stability and prosperity"<sup>294</sup> and preclude a smooth transition from colony to S.A.R.

China and pro-China sources also argued more explicitly that the Patten reforms would hurt Hong Kongers' interests and frustrate their hopes. They asserted that the Basic Law and the P.R.C.'s proposals during the Sino-British negotiations over Patten's political reform plan were adequate to assure the popular package of stability, prosperity, convergence with the Basic Law, and avoidance of political conflict.<sup>295</sup> They argued that Patten's reforms would threaten to unravel this arrangement. Patten's political reform program, Zhou Nan asserted, "undermined Hong Kong's stability and prosperity and damaged the vital interests of Hong Kong residents."<sup>296</sup> Chinese Premier Li Peng derided Patten's proposed electoral reform legislation as an effort "to create disorder and impede the smooth transfer of power."<sup>297</sup> The pro-China press warned that Patten's Joint Declaration-

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<sup>291</sup> See Chen, *supra* note 272.

<sup>292</sup> Xinhua's Zhou Nan Reaffirms Stance on Hong Kong, *supra* note 262.

<sup>293</sup> Gilley, *supra* note 112, at 31-32; Diane Stormont, *China Envoy Paints Rosy Picture of Post-1997 Hong Kong*, Reuters, Apr. 12, 1996, available in LEXIS, Asiapac Library, Allasi File.

<sup>294</sup> Gilley, *supra* note 112, at 31-32.

<sup>295</sup> See, e.g., *What the Legislators Said*, *supra* note 87 (quoting a pro-China Legco member's comments during a debate on Patten reforms that the Basic Law and not "Patten's fantasy" was the route to stability). The *Text of Chinese Statement on Breakdown of Sino-British Talks on Hong Kong*, *supra* note 265, described Chinese proposals as "designed to facilitate a smooth transition" and to "ensure [Hong Kong] residents a happy and peaceful life" and as "conducive to convergence with the Basic Law" and "the general wishes of the Hong Kong people." *Id.*

<sup>296</sup> Xinhua's Zhou Nan Reaffirms Stance on Hong Kong, *supra* note 277; cf. *Noise in Policy Address*, *supra* note 281 (presenting the pro-China Hong Kong press' similar criticism of Patten in a commentary on the Governor's 1995 annual policy address).

<sup>297</sup> Jonathan Karp, *Through Train Slows Down*, FAR E. ECON. REV., Mar. 25, 1993, at 12.

breaching and Basic Law-violating reforms entailed "using Hong Kong people's interests as pawns" and increasing "uncertainty and instability."<sup>298</sup> This line of argument added that the people of Hong Kong, not Patten, would suffer the consequences of the Governor's irresponsible games. Patten would "simply go away after June 30, 1997 and the chaotic situation stirred up by him" would have to be "cleared up by the people of Hong Kong."<sup>299</sup> The "silent majority [of Hong Kong people] who seek nothing more than to get on with their lives" would be like "the innocent children" who inevitably "suffer most" in a "broken family."<sup>300</sup>

After the Patten reforms became law, China and its Hong Kong allies continued their efforts to build popular support for their positions by linking the laws and policies they opposed to outcomes inconsistent with the people's interests in, and yearnings for, stability and prosperity. In the campaign preceding the 1995 Legco elections, pro-China voices cautioned voters that the democrats were "trouble-makers" who would fail to work for the interests of the public and a smooth transition and thus would do Hong Kong no good.<sup>301</sup> After the elections, a leader of the pro-China D.A.B. darkly warned that pro-democracy candidates' victories were a result that the Hong Kong people would "have to pay" for by having a legislature incapable of communicating with China and thus unable to serve the people's interest in a smooth transition.<sup>302</sup>

The controversy over the Provisional Legislature brought forth similar arguments. The pro-China camp charged that the democrats' attacks on the Provisional Legislature "opposed China

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<sup>298</sup> *Just Keep a Watch over Mr. Chris Patten's Performance*, *supra* note 287, at 2.

<sup>299</sup> Li Dahong, *How Long Can the 'Last Governor' Hold Out?*, LIAOWANG, Feb. 28, 1994, at 48-49 (presenting the quasi-official Beijing publication's comments on Patten's electoral reform legislation).

<sup>300</sup> *Legco Members Stress that Patten's Actions Hurt Ordinary Hong Kong Citizens*, New China News Agency, Beijing, Feb. 24, 1994, reprinted in BBC Summary of World Broadcasts, Feb. 26, 1994, available in LEXIS, Asiapc Library, Allasi File (quoting Legco member Elsie Tu).

<sup>301</sup> See Louise do Rosario, *Thorn in the Side*, FAR E. ECON. REV., Apr. 20, 1995, at 28 (quoting Xinhua Hong Kong Deputy Director Wang Rudeng); do Rosario, *supra* note 275, at 26 (citing D.A.B. leader Cheung Kai-nam's comments to *Wen Wei Po*).

<sup>302</sup> See Higgins, *supra* note 288, at 17.

and brought disorder to Hong Kong" [*fanhua luangang*].<sup>303</sup> In the same vein, a pro-China newspaper warned that Governor Patten's statement that any laws passed by the Provisional Legislature "would inevitably be vulnerable to subsequent legal challenge in the courts" was tantamount to "encouraging some people to oppose the laws enacted by the Provisional Legislature" and "aim[ed] to undermine Hong Kong's future social stability."<sup>304</sup>

China and its Hong Kong allies had reason to be confident that their arguments, explicitly linking their opponents' laws and policies to harms to Hong Kong's interests and Hong Kongers' true preferences, would achieve some of their intended effect on public opinion in the territory. The Hong Kong people could be expected to understand that China and its Hong Kong allies and agents were capable of causing many of the adverse political and economic developments that P.R.C. and pro-China arguments predicted would follow from support for democratic reforms. Moreover, China and pro-China statements frequently stressed, the derailing of the through train for the 1995 Legco and the establishment of the Provisional Legislature were simply an undeniable and intractable "reality" of transitional Hong Kong's legal and political order that the colonial administration, liberal politicians, and ordinary Hong Kongers would do well to accept.<sup>305</sup>

This array of "scare tactics" and appeals to material interest did not, however, exhaust the China and pro-China side's strategy of linking support for its preferred positions to the preservation or advancement of other values thought to be embraced by the Hong Kong people. Chinese authorities and their most reliable backers in Hong Kong also sought to cultivate popular support by appealing to a loose notion of Chinese nationalism that could be expected to resonate with the Hong Kong people. P.R.C. and

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<sup>303</sup> Gilley, *supra* note 112, at 31.

<sup>304</sup> *Provisional Legislature Must Be Set Up as Scheduled*, TA KUNG PAO, Oct. 8, 1996, at A2.

<sup>305</sup> See, e.g., *A Statement from the British Side Cannot Bar the Provisional Legislative Council*, *supra* note 269, at A2; Lawrence Chung, *China, Britain Trade Verbal Broadside as Votes Cast for Hong Kong Assembly*, Agence France Presse, Dec. 21, 1996, available in LEXIS, Asiapc Library, Allasi File (quoting Qian Qichen's statement that "[r]egrettably, Britain lacks the courage to face [the] reality" that the Provisional Legislature must be accepted).

pro-China sources thus attacked the Patten reforms as attempts to make Hong Kong a "base for subversion."<sup>306</sup> They condemned Hong Kong democrats for seeking foreign backing to oppose moves to derail the "through train."<sup>307</sup> They also criticized Hong Kong democrats for wanting to ape Western institutions without paying attention to Hong Kong's ways and interests.<sup>308</sup> The people could be expected to distance themselves from such activities, if they believed the charges, and to perceive another signal of China's strong opposition to the liberals' and democrats' agenda, even if they rejected the charges as false.

Finally, the China and pro-China side's strategy targeting the people in the battle over democratic reform and the fate of the legislature included another, more complex dimension. This line of argument partly accepted that democracy appealed to the Hong Kong people, and sought to construe the idea of sufficient democracy for Hong Kong in a manner compatible with the positivist and nationalist vision of domestic sovereignty over Hong Kong that formed the core of the official Chinese and pro-Chinese Hong Kong perspective.

A degree of accommodation to popular preferences for representative democracy was implicit in the official P.R.C. and pro-China assault on the legislative decisions and elections that the colonial administration oversaw in the early and middle 1990s. By arguing to the Hong Kong people that the particular procedures the colonial authorities adopted were unfair or unrepresentative,

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<sup>306</sup> Tai Ming Cheung, *Glacial Thaw*, FAR E. ECON. REV., July 22, 1993, at 13 (quoting pro-China think-tank head Shiu Sin-por). See also, *Be Vigilant Against Instigating Political Confrontation*, TA KUNG PAO, July 10, 1996, at A2 (charging that Patten wanted S.A.R. government institutions "to be trusted by the United Kingdom and [to] work for extending British rule").

<sup>307</sup> See, e.g., Gilley, *supra* note 38, at 31-32 (noting pro-China press condemnation of Martin Lee's trip to North America to seek foreign support for his agenda on the Provisional Legislature and other matters); *Attempts To Foster "Pro-British Force" Will Have "Unfavorable" Consequences*, TA KUNG PAO, May 31, 1992, translated in BBC Summary of World Broadcasts, June 1, 1992, available in LEXIS, Asiapac Library, Allasi File (criticizing U.D.H.K. for seeking support of British people to press China to amend the Basic Law to accommodate democratic electoral reform); cf. *Tung Chee-hwa's Remarks are Beneficial to Hong Kong's Prosperity*, *supra* note 238, at A4 (presenting Tung Chee-hwa's similar criticism of Martin Lee's trip to Europe).

<sup>308</sup> See, e.g., Catherine Ng et al., *Final Verdict on Legco*, S. CHINA MORNING POST, Mar. 25, 1996, at 1 (quoting Qian Qichen); Simon Holberton, *Populism at War with Political Correctness*, FIN. TIMES (London), Dec. 18, 1993, at 9 (quoting a Xinhua commentary).

China and its allies, at least implicitly, conceded that the Hong Kong people wanted democratic elections and an active legislature. Accommodation of local democratic values was more nearly explicit in Chinese and pro-China arguments that the institutions and processes that the P.R.C. directly and indirectly created for transitional Hong Kong were democratically legitimate and adequately representative. Broadly, China and its Hong Kong allies asserted that China had followed a principle of "facing and relying on the Hong Kong people" throughout the protracted struggles over democratic reforms and the Provisional Legislature.<sup>309</sup> The territory's pro-China press dismissed the colonial government's and pro-democracy politicians' charge that China did "not trust[] the Hong Kong people," saying that the falsity of the accusation was "perfectly obvious and could not be denied by anyone."<sup>310</sup>

More specifically, China and its Hong Kong allies pointed to the P.W.C., the P.C., and more informal P.R.C.-established methods for "solicit[ing] opinions of the local people," "listening to opinions from all social circles," and "relying on the Hong Kong people."<sup>311</sup> Official China and pro-China sources argued that these mechanisms demonstrated China's sincere commitment to "advanc[ing] Hong Kong's democratic progress" and were sufficient to give the Hong Kong people a "full say" in establishing S.A.R. law-making institutions.<sup>312</sup> According to this line of argument, the selection of the Provisional Legislature had similar virtues. Qian Qichen explained that the Selection Committee chose the legislature through a "just, fair and open ballot."<sup>313</sup> The Selection Committee, a prominent pro-China Hong Kong politician pointed out, was composed entirely of Hong Kong people and had "many candidates" from which to choose.<sup>314</sup>

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<sup>309</sup> *Be Vigilant Against Instigating Political Confrontation*, *supra* note 306, at A2.

<sup>310</sup> *Id.*

<sup>311</sup> *China Welcomes Election of First Chief Executive*, Xinhua, Dec. 11, 1996, available in LEXIS, Asiapc Library, Allasi File.

<sup>312</sup> *Id.*; see *Fruitful Initial Preparatory Work*, *supra* note 266, at 5; see also Li, *supra* note 265, at 12 (describing Lu Ping's belief that Hong Kong people had "a full say in important issues, such as Hong Kong's future").

<sup>313</sup> Sharma, *supra* note 116.

<sup>314</sup> Saki Ouchi, *Democrats Concerned over Basic Law Interpretation*, DAILY YOMIURI, Jan. 1, 1997, at 7 (quoting Tsang Yok Sing).

The Provisional Legislature itself, Qian added, was representative of the Hong Kong people in that its members came from "all walks of life."<sup>315</sup>

A few prominent pro-China voices in Hong Kong, including D.A.B. leader and Provisional Legislature member Tsang Yok-sing and prominent social scientist and Preparatory Committee member Lau Siu-kai, went further in accepting the apparent popular preference for representative democracy, and in seeking to articulate a democratic claim to popular support for pro-China positions. They argued that the Provisional Legislature's legitimacy stemmed, in part, from the fact that more than half of its members were members of the Legco elected in 1995, and thus had won the endorsement of the Hong Kong people who formed the relevant electorates.<sup>316</sup> They further argued that the Hong Kong people had no reason to fear that the Provisional Legislature would be democratically unresponsive, as most of its members would want to run for reelection to the first full-term S.A.R. legislature in 1998.<sup>317</sup> After the last colonial Legco was clearly doomed, but before the final decision to establish a Provisional Legislature, the D.A.B.'s Tsang had even suggested fresh elections before July 1, 1997 to give the first S.A.R. law-making body a solid electoral pedigree (even though he accepted that the new balloting might produce yet another legislature with a large block of democrats).<sup>318</sup>

Beneath these sometimes divergent moves on the pro-China side to accommodate popular preferences and pressures for democratization, there remained a firm insistence on the positivist principles that were central to the vision of law that the P.R.C. and its Hong Kong allies shared. The institutions and processes that China and pro-China sources claimed were sufficient to satisfy Hong Kongers' democratic demands, and any legal and institutional arrangements that China would provide or tolerate for Hong Kong, had to be rooted in positivist grants by the

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<sup>315</sup> Sharma, *supra* note 116 (quoting Qian Qichen).

<sup>316</sup> See Sharma, *supra* note 124.

<sup>317</sup> See Ouchi, *supra* note 311; Yeung & Choy, *supra* note 96, at 1.

<sup>318</sup> See Gilley, *supra* note 38, at 14-15 (describing Tsang's recognition of the likelihood of the democrats' victory in fair elections); Lee, *supra* note 102, at 19 (describing Tsang's proposal for fresh elections); Tai Ming Cheung, *Common Front*, FAR E. ECON. REV., Dec. 17, 1992, at 19 (describing Tsang's acceptance of the need to defer to the majority view if it supported Patten reforms).



Chinese sovereign and could not compromise the requisites of Chinese sovereignty. In Chinese Vice Premier Wu Xueqian's most blunt formulation, only the P.R.C. government, as the repository of sovereign authority over all Chinese citizens including those in Hong Kong, could speak for the people of Hong Kong during "the transition period."<sup>319</sup> Questions regarding the institutions and forms of democracy for Hong Kong were, on this view, ultimately for China itself to decide, or for China to delegate the decision to the S.A.R. government or the Hong Kong people.<sup>320</sup> Official sources explained that the P.R.C. endorsed the development of democracy in Hong Kong in accordance with the P.R.C.'s chosen principle of "gradual and orderly progress" proceeding from Hong Kong's "reality," which included the attitudes and values of the Hong Kong people.<sup>321</sup>

More specifically, pro-China sources stressed that the Provisional Legislature derived its legitimacy primarily from the authorizing enactments of the N.P.C. and the P.C., as well as the support of the Hong Kong people.<sup>322</sup> Most broadly, the P.R.C. position was that the policy of "Hong Kong people ruling Hong Kong" [*gangren zhigang*], and its implementation through S.A.R. laws and institutions, reflected China's sovereign choices. The policy doubtless had greater popular appeal than the alternative of more centralized control over Hong Kong, but its popularity was significant primarily as a factor in the sovereign's prudential calculations concerning which policy to choose. Moreover, China required that those "Hong Kong people" who were to rule Hong

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<sup>319</sup> Philip Bowring & Emily Lau, *Turning Up the Heat*, FAR E. ECON. REV., Feb. 14, 1991, at 23.

<sup>320</sup> See, e.g., Stacy Mosher, *Basic Flaw*, FAR E. ECON. REV., June 11, 1992, at 18 (arguing, on the eve of Patten's arrival, that China believed that China, not Britain, could grant the people of Hong Kong greater democracy); *Tung Chee-hwa Clarifies Seven Points of Misunderstanding, Stressed Hong Kong SAR Will Make Laws on Its Own*, *supra* note 229, at A12 (discussing the Chief Executive-designate's comments that the S.A.R. would make its own laws under the arrangement provided by the Basic Law); Chris Yeung, *Lu Puts the Case for His Hong Kong*, S. CHINA MORNING POST, June 8, 1996, at 17 (describing Lu Ping's explanation that the Chinese government is committed to giving Hong Kong its autonomy after the end of British rule); see also Gilley, *supra* note 38, at 14-15 (describing proportional representation, as opposed to single-member districts, as a structure China might adopt for S.A.R. legislative elections).

<sup>321</sup> *A Political Gamble that Contravenes the Sino-British Joint Declaration and the Basic Law*, *supra* note 263.

<sup>322</sup> See Zhang, *supra* note 268.

Kong had to be ones who "loved China and loved Hong Kong" [*aiguo aigang*] and thus could be trusted not to undermine China's sovereignty over the territory.<sup>323</sup>

In sum, many of the China and pro-China side's arguments endorsed some accommodation of the Hong Kong people's democratic preferences and interests, and they often seemed carefully phrased to appeal to local pride and sentiment. Nonetheless, they also revealed the limits to accommodation that the P.R.C.'s and its allies' core conception of law and sovereignty imposed in the battles over the people's attitudes toward democratic reform and Hong Kong's legislature.

### 2.3.3. *The Court of Final Appeal: Of Alternatives, Baselines, and Popular Concerns*

China and its Hong Kong allies made only modest visible efforts to develop or demonstrate broad public support for the initial Sino-British agreement on the Court of Final Appeal, reached in 1991. To be sure, P.R.C. sources expressed discomfort with Patten's submitting the deal's fate to a vote in Legco. China and its allies worried that Patten had thereby made implementation of the Court deal dependent on the whims of a body hostile to China, and had assigned Legco a role that undercut established principles of executive-led government that the S.A.R. was slated to inherit.<sup>324</sup> The kind of arguments that P.R.C. officials and pro-China leaders in the territory stressed in connection with the 1995 accord, however, were not as prominent in the early 1990s. Hong Kong residents' still-fresh memories of the Tiananmen Incident presumably suggested that it might be counterproductive to launch an open, full-scale official P.R.C. or pro-Chinese effort to promote a C.F.A. arrangement that liberals derided as under-

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<sup>323</sup> See *Fruitful Initial Preparatory Work*, *supra* note 266, at 5 ("It should be pointed out that patriots should constitute the bulk of those 'Hong Kong people participating in administering Hong Kong.'"); Higgins, *supra* note 288, at 17 (noting *Ta Kung Pao's* resurrection of the Deng quotation); Chris Yeung, *For the Love of Hong Kong*, S. CHINA MORNING POST, Feb. 15, 1997, at 15 (similarly noting Tung Chee-hwa's embrace of the *aiguo aigang* standard).

<sup>324</sup> See Li Haiting, "Basic Law" Essentially Ensures Democracy for Hong Kong People, *Xinhua*, Jan. 9, 1994, available in LEXIS, Asiapc Library, Allasi File; Mosher, *supra* note 136, at 10; Chris Yeung & Fannie Wong, *When the Lights Go Out at Legco*, S. CHINA MORNING POST, Oct. 15, 1994, at 21 (describing a broader pro-China concern with the erosion of executive-led government and heralding the prospect of its restoration).

mining the rule of law and endangering the liberties of Hong Kong citizens. Additionally, especially in the days before the political reform row had revealed a newly feisty Legco, Chinese officials perhaps were confident that the colonial government's commitment to implementing the arrangement to which the British government had agreed would be enough to secure passage of the necessary local legislation.

When the second C.F.A. accord was on the agenda, China and its supporters in the territory made more forceful and extended efforts to claim or to create public support or acquiescence, although less than they did in the context of the conflicts over political reform and the Bill of Rights, where the British authorities were more adversaries than allies. A principal purveyor of P.R.C. orthodoxy in the Hong Kong press asserted that the signing of the 1995 agreement "merit[ed] the Hong Kong people's feeling pleased."<sup>325</sup> The "small handful of politicians" who sought to undermine the accord were engaged in acts that "r[a]n counter to the principle of Hong Kong people running Hong Kong," and the pro-China press expressed confidence that the Hong Kong people were "completely capable" of distinguishing between such people and the supporters of the deal who "genuinely represent[ed] the interests of the Hong Kong people."<sup>326</sup>

From the P.R.C. and pro-China perspective, popular support for the 1995 deal was to be expected, in part because the accord mandated a court that would satisfy the apparent wishes and assuaged the apparent worries of the Hong Kong people concerning their post-reversion judiciary. In the words of Zhao Jihua, head of the Chinese delegation to the Sino-British Joint Liaison Group ("J.L.G.") that reached the agreement, the 1995 deal was "good news" for "the Hong Kong public" which was "concerned about the question of the Hong Kong Court of Final Appeal and about Hong Kong's future rule of law."<sup>327</sup> A P.R.C. Foreign Ministry spokesman explained that the C.F.A. agreement would help ensure that Hong Kong enjoyed "an independent and

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<sup>325</sup> *Agreement on Court of Final Appeal Embodies Results of Preliminary Working Committee Work*, *supra* note 266.

<sup>326</sup> *Id.*; cf. Lu Ping Says It's Not China's Fault that the Court of Final Appeal Issue Is Not Yet Resolved, MING PAO, Mar. 26, 1995.

<sup>327</sup> Zhao Jihua Speech on Signing of Court of Final Appeal Agreement, WEN WEI PO, June 10, 1995, at A2.

complete judicial system.”<sup>328</sup> A leading pro-China paper in Hong Kong asserted that the renewed Sino-British cooperation, in which the 1995 Court accord played a central part, would assure Hong Kong's smooth reversion, the preservation of the territory's stability and prosperity, and the full realization of the principles of “one country two systems,” “Hong Kong people ruling Hong Kong,” and “a high degree of autonomy.” These were “wishes of most Hong Kong people” that China hoped to see realized under a policy of trying “to please the Hong Kong people.”<sup>329</sup>

The China and pro-China side's confidence that the terms of the 1995 Court deal enjoyed popular support was limited, however. In their arguments about the attractions for the Hong Kong people of a Court in keeping with the accord, China and its Hong Kong allies frequently mixed claims about the people's “interests” with assertions about their established preferences. This at least suggested doubt about whether the people's wishes were already in line with their asserted interests. Other arguments more strongly suggested that the Court accords' proponents perceived a need to build, and not simply to identify, popular support for the deal. In this vein, official Chinese and pro-China sources attempted to draw connections between the Court accord and broader issues of concern to the people of Hong Kong. They argued that, even if the C.F.A. arrangement was not all that some in Hong Kong had hoped for, the structure it prescribed would be a step forward for values embraced by Hong Kong residents, including many who did not ordinarily endorse much of the P.R.C.'s agenda. More specifically, according to this line of argument, the Court deal would advance democracy and autonomy.

P.R.C. sources stressed that with the establishment of a Court of Final Appeal in keeping with the 1995 agreement, Hong Kong would enjoy, for the first time in its history, the power of final adjudication. A court consisting primarily of Hong Kong people would sit in Hong Kong to exercise the highest judicial power

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<sup>328</sup> *China Hopes Court Deal Will Boost Sino-British Ties*, Agence France Presse, June 13, 1995, available in LEXIS, Asiapc Library, Allasi File.

<sup>329</sup> *Paper on Renewed Sino-British Cooperation on Handover*, TA KUNG PAO, July 1, 1995, at A2, translated in BBC Summary of World Broadcasts, July 7, 1995, available in LEXIS, Asiapc Library, Allasi File; see also *Full Text of Remarks by Ambassador Zhao Jihua, Chinese Joint Liaison Group Team Leader*, *supra* note 325.

over the territory.<sup>330</sup> A leading pro-China newspaper boasted that, in contrast to Hong Kong's departing colonial masters, China was confident that "the Hong Kong people" were "entirely capable" of setting up an adequate Court.<sup>331</sup> On this view, the C.F.A. deal "created the conditions for the Hong Kong people to participate in Hong Kong affairs before 1997 and also laid a solid foundation for the Hong Kong people to administer Hong Kong after 1997."<sup>332</sup> A Court composed predominantly of Hong Kong judges, approved by a Provisional Legislature of Hong Kong members representing Hong Kong people was "conducive to the practice of Hong Kong's being ruled by Hong Kong people."<sup>333</sup>

For those who might not be persuaded by such effusive and expansive claims, pro-P.R.C. sources pointed to more modest and less immediately rule-of-law-related virtues of the C.F.A. accord that could be expected to hold some appeal for the people of Hong Kong. A Legco member from the D.A.B. argued that the 1995 accord was a good arrangement because it would allow the Hong Kong people to have a clear picture of the Court before China's resumption of sovereignty. Potentially disruptive uncertainty would be reduced.<sup>334</sup> Other pro-China sources added that the breakthrough in Sino-British cooperation that the Court accord heralded was also a harbinger of progress on a number of concrete bilateral issues the resolution of which would be welcomed by Hong Kong's citizens as an additional reduction in transition-related uncertainty.<sup>335</sup> Such accomplishments,

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<sup>330</sup> See *Full Text of Remarks by Ambassador Zhao Jihua, Chinese Joint Liaison Group Team Leader*, *supra* note 325.

<sup>331</sup> *Agreement on Court of Final Appeal Embodies Results of Preliminary Working Committee Work*, *supra* 266.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*; see also *Basic Law*, *supra* note 21, art. 90; *A Statement from the British Side Cannot Bar the Provisional Legislative Council*, *supra* note 269; *Chinese FM Denies Hong Kong's Selection Committee Is a Fix*, *Agence France Presse*, Nov. 15, 1996, available in LEXIS, Asiapc Library, Allasi File (concerning the Provisional Legislature's role).

<sup>334</sup> See *Won & Wong*, *supra* note 146.

<sup>335</sup> See, e.g., *Agreement on Court of Final Appeal Embodies Results of Preliminary Working Committee Work*, *supra* note 266, at A2 (arguing that the accord merited "Hong Kong people's feeling pleased" largely because it portended additional Sino-British cooperation on various issues); *Hong Kong: Paper on Renewed Sino-British Cooperation on Handover*, *supra* note 327 (linking the C.F.A. accord with broader Sino-British cooperation and satisfaction of the Hong Kong people's wishes); Jonathan Sprague, *Top Hong Kong Official Meets*

proponents of this line of argument understood, were important to the territory's economy and thus would be likely to appeal to ordinary Hong Kongers' sense of their material interests.<sup>336</sup>

Although some of the arguments that China and its allies made concerning the people's actual or prospective views on the C.F.A. at times paralleled the arguments from British and colonial government proponents of the Court accords, the P.R.C. and pro-China arguments nonetheless proceeded from different premises and were intertwined with a line of argument that turned to different fundamental principles. Similar to the arguments they advanced in the conflicts over popular attitudes toward other legal issues of the endgame, the P.R.C. and pro-China side's arguments about the people's views and the Court of Final Appeal insisted that a Court arrangement for the S.A.R. be consistent with China's and the pro-China camp's basic positivist concept of domestic legality, as well as sufficiently appealing to secure acceptance from the people of Hong Kong.

Thus, the "special arrangements" for the establishment of the C.F.A. that would surely please the people of Hong Kong were, J.L.G. team leader Zhao reminded Hong Kongers, arrangements that China had agreed to make "precisely on account of the decision of the Chinese government to allow the Hong Kong Special Administrative Region to enjoy a high degree of autonomy, including [the] power of final adjudication."<sup>337</sup> Similarly, the 1995 accord's requirement that the Provisional Legislature confirm the first C.F.A. judges was both an advance for broadly democratic values popular in Hong Kong and a corollary to the principle that the judges would derive their power from the legislative body that derived its authority from positive sovereign enactments of the P.R.C.<sup>338</sup> Finally, a pro-China Legco member

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*Chinese Leaders*, Reuters, July 4, 1995, available in LEXIS, Asiapc Library, Allasi File (attributing an upswing in Hong Kong popular attitudes toward China to the breakthrough on the C.F.A. deal).

<sup>336</sup> The economically vital new airport project, a victim of repeated snags at the Joint Liaison Group ("J.L.G."), was one important area that would benefit from improved bilateral cooperation.

<sup>337</sup> *Full Text of Remarks by Ambassador Zhao Jihua, Chinese Joint Liaison Group Team Leader*, *supra* note 325.

<sup>338</sup> See, e.g., *A Statement from the British Side Cannot Bar the Provisional Legislative Council*, *supra* note 269; *Agreement on Court of Final Appeal Embodies Results of Preliminary Working Committee Work*, *supra* note 266; *Chinese FM Denies Hong Kong's Selection Committee Is a Fix*, *supra* note 333.

explained that the fundamental protection of the popularly prized common-law rule of law under the Court deal was the Basic Law's provision that the N.P.C. Standing Committee would take common law practices fully into account when it exercised its power to determine whether cases raising potentially difficult political and structural issues fell within the Court's jurisdiction.<sup>339</sup>

2.3.4. *The Chief Executive: Democratic Advances, Local Values, and Granted Powers*

P.R.C. officials and China's allies and agents in Hong Kong claimed and sought popular support for, or acquiescence in, the Chief Executive selection process initially by defending the process as one that provided ample means for reflecting the will of the Hong Kong people and that fit reasonably well with popular preferences for democratic processes. Thus, the Chinese Foreign Ministry and the official Chinese press asserted that the process for selecting a candidate was democratic, fair, and open.<sup>340</sup> In his speech to the initial session of the Selection Committee that was to nominate the Chief Executive for formal appointment by the Central People's Government in Beijing, Foreign Minister Qian Qichen insisted that the members of the committee were free to make their "own decision about selecting the candidates" and should "ignore the rumours that the candidates were hand-picked from the top."<sup>341</sup> More boldly still, D.A.B. leader Tsang Yok-sing commented that letting Beijing make the final choice would "be very unpopular in Hong Kong" and therefore ill-advised.<sup>342</sup>

The P.R.C. and its Hong Kong supporters sought to present the selection process as one that, as a matter of principle and in

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<sup>339</sup> See Yeung et al., *supra* note 138 (quoting Tam Yiu-cheng).

<sup>340</sup> See, e.g., *China Says Britain Duty-Bound To Support New HK Chief*, Agence France Presse, Dec. 12, 1996, available in LEXIS, Asiapc Library, Allasi File (quoting a Chinese Foreign Ministry spokesman); *China Welcomes Election of First Chief Executive*, *supra* note 306; cf. *Full Text of Questions and Answers at Tung Chee-hwa's News Conference for Chinese, Foreign Reporters in Beijing*, WEN WEI PO, Dec. 20, 1996 (reporting similar comments from Tung Chee-hwa).

<sup>341</sup> *Chinese FM Denies Hong Kong's Selection Committee Is a Fix*, *supra* note 333.

<sup>342</sup> *Straw Poll: Who Will Make the Best Chief Executive?*, FAR E. ECON. REV., Feb. 8, 1996, at 28.

practice, took into account the preferences of the Hong Kong people. The Chinese position emphasized that the Selection Committee that voted overwhelmingly for Tung Chee-hwa was drawn from a broad spectrum of Hong Kong society.<sup>343</sup> Lu Ping commented two years before Tung's selection that the person chosen for the post would have to enjoy "prestige among HongKongers [sic]."<sup>344</sup> Qian Qichen and Jiang Zemin stressed that candidates for the position should face the people and should be leaders whom the people of Hong Kong could trust.<sup>345</sup> In the run-up to the Selection Committee's balloting, the candidates had clearly been made to understand that they were to campaign among the public, listening to their views and soliciting their support.<sup>346</sup>

Moreover, P.R.C. and Hong Kong pro-China sources reminded the territory's residents that the Chief Executive Selection process was much more democratic — and thus more immediately reflective of Hong Kong people's preferences — than the process of appointing colonial governors from London that it replaced. The body that picked the nominee for Chief Executive was, Qian Qichen argued, "chosen by the people of Hong Kong for the first

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<sup>343</sup> The position was, to a degree, enshrined in framework legal documents for the S.A.R. See Basic Law, *supra* note 21, art. 45 (providing the framework for the selection of the Chief Executive); *id.* annex I (providing for the election of the Chief Executive by a "broadly representative election committee" of 800 members, "appointed by the Central People's Government" and drawn in equal shares from "industrial, commercial and financial sectors," "the professions," "labour, social services, religious and other sectors," members of the legislature, representatives of district organizations, Hong Kong deputies to the N.P.C., and representatives of Hong Kong members of the principal P.R.C. united front organization); N.P.C. Decision, *supra* note 21, §§ 3-4 (providing for a Selection Committee of 400, drawn equally from among the same four sectors described in Annex I to the Basic Law, to nominate a candidate for appointment by the Central People's Government to serve as the S.A.R.'s first Chief Executive).

<sup>344</sup> Mary Kwang, *Who Will Be the One To Lead HK Come 1997?*, STRAITS TIMES (Singapore), July 24, 1994, at 8.

<sup>345</sup> See Chris Yeung & Fung Wai-kong, *Peter Woo: We Must Feel Safe and Free*, S. CHINA MORNING POST, Oct. 9, 1996, at 6.

<sup>346</sup> See, e.g., *id.*; *China Welcomes Election of First Chief Executive*, *supra* note 308 (praising the three candidates for having "showed their dedication to Hong Kong," and for having "worked hard to increase mutual understanding with people in the various sectors of the region").



time.”<sup>347</sup> As never before, Hong Kong's people had been consulted in the selection of the territory's top official. On this view, the selection of the first Chief Executive-designate marked the beginning of “the true development of democracy for Hong Kong” and the laying of “a foundation for the establishment of a democratic system” in Hong Kong.<sup>348</sup>

In addition, China and pro-China sources asserted that a popularly accepted process had yielded a genuinely popular choice. As the official Chinese press described it, “the smooth election of the candidate for Chief Executive demonstrates that the type of democracy adopted in Hong Kong according to the one country, two systems principle and the Basic Law” had won “approval by the Hong Kong people.”<sup>349</sup> According to P.R.C. officials, Tung had won a landslide victory “thanks to the support of the Hong Kong people”; his victory was a reflection of the wishes of “the majority of Hong Kong compatriots.”<sup>350</sup> Providing some evidence to support such claims, public opinion polls found high initial approval ratings for Tung, and generally liberal commentators noted the dilemma that Hong Kong's pro-democracy politicians faced in taking on a Chief Executive-designate who had won something of a popular endorsement and was seeking to build bridges to groups that had not initially supported him.<sup>351</sup>

Nonetheless, official Chinese and unofficial pro-China commentary could not completely dismiss or ignore the indications of popular disaffection, particularly once Chief Executive-designate Tung began to press pro-China positions on the key legal and institutional questions of the endgame. China and its Hong Kong supporters accordingly advanced arguments that conceded that they faced some unfavorable popular attitudes, tried to minimize the significance of those negative views, and sought

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<sup>347</sup> *Chinese FM Denies Hong Kong's Selection Committee Is a Fix*, *supra* note 333.

<sup>348</sup> *Id.*; see *China Welcomes Election of First Chief Executive*, *supra* note 310; cf. *China Says Britain Duty-Bound To Support New HK Chief*, *supra* note 340 (reporting similar comments from Tung Chee-hwa).

<sup>349</sup> *China Welcomes Election of First Chief Executive*, *supra* note 311.

<sup>350</sup> *China Says Britain Duty-Bound To Support New HK Chief*, *supra* note 340; *China Welcomes Election of First Chief Executive*, *supra* note 311.

<sup>351</sup> See, e.g., Fung Wai-kong, *The Dilemma Awaiting the Democrats*, S. CHINA MORNING POST, Dec. 14, 1996, at 21; Chris Yeung, *The Obligations of Office*, S. CHINA MORNING POST, Dec. 14, 1996, at 21.

to persuade the people to accept the non-negotiable aspects of the arrangement. Thus, the newly anointed Chief Executive-designate stated that he would work to overcome weaknesses in his popularity,<sup>352</sup> but not, he stressed, to the extent of becoming a slave to transient popular opinion or at the expense of "the long-term and overall interest of Hong Kong."<sup>353</sup> Concerning one of the specific positions on controversial issues that undermined his popularity, Tung was confident that the Hong Kong people would be sensible and accept the Provisional Legislature and his use of the Chief Executive's office to cooperate with and support the new body.<sup>354</sup> The official voice of Beijing in the territory, Hong Kong Xinhua chief Zhou Nan reminded Hong Kongers that the "Hong Kong people should render great support" both to the Provisional Legislature and to the Chief Executive.<sup>355</sup>

Chinese and pro-China arguments that sought to persuade the people to be "sensible" and to offer "great support" to the new Chief Executive and his S.A.R. government often drew connections between those goals and the advancement or preservation of other values that seemed to have a secure hold on the Hong Kong people. In their appeals to local senses of pride and political competence, the P.R.C. and pro-China arguments emphasizing the democratic and autonomy-accepting virtues of the Chief Executive selection process were partly in this vein. The controversy surrounding Tung's endorsement of China's position on the Bill of Rights and civil liberties provided a major occasion for a more focused version of this line of argument. Where critics among Hong Kong's liberal and democratic politicians charged capitulation to China and betrayal of the will and interests of the Hong Kong people, P.R.C. and pro-China backers of Tung's stance depicted a Chief Executive-designate using his office to defend and promote Hong Kongers' values. As portrayed in laudatory coverage in the territory's pro-China press, Tung's position on the Bill of Rights and related laws was in step with the partly Chinese

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<sup>352</sup> See, e.g., Yeung, *supra* note 349 (describing Tung's efforts to build trust and support in a community that had had no opportunity to vote for him).

<sup>353</sup> Chris Yeung & Linda Choy, *Livelihood Top HK Concern, Claims Tung*, S. CHINA MORNING POST, Mar. 1, 1997, at 1 (quoting Tung's comments).

<sup>354</sup> See *Full Text of Questions and Answers at Tung Chee-hwa's News Conference for Chinese, Foreign Reporters in Beijing*, *supra* note 340.

<sup>355</sup> *Zhou Urges Support for Tung*, S. CHINA MORNING POST, Feb. 18, 1997, at 4.

and non-Western values of the people of Hong Kong.<sup>356</sup>

Seen from this perspective, it was the liberals and democrats who showed a lack of confidence in Hong Kongers' abilities to rule themselves and harmed Hong Kongers' interests by speaking ill of Hong Kong's incoming regime and new laws to foreigners. Tung won great praise in Hong Kong's pro-China press for saying that "Hong Kong people must respect their nation and the dignity of the SAR government"<sup>357</sup> — a quality that liberal critics of Tung apparently lacked. Extending the argument, Tung criticized Martin Lee and others for "go[ing] abroad to blacken the name of Hong Kong, [for inciting] foreigners to come to Hong Kong and tell us, the Hong Kong people, what to do"<sup>358</sup> and for failing to "sit down and talk about family matters in our own home."<sup>359</sup> Pro-China commentaries argued that, in making such comments and in urging liberal and pro-democracy politicians not to besmirch Hong Kong, Tung was fulfilling his responsibility to protect the interests of the Hong Kong people.<sup>360</sup>

As these defenders of Tung's positions saw it, liberal critics' charges that Tung sold out Hong Kong's interests to China's preferences asserted contradictions where none existed. Pro-China sources explained that China and the people of Hong Kong had compatible interests and that Tung was merely showing that he possessed a key qualification for the office of Chief Executive: the ability to bridge gaps in understanding between the people of the S.A.R. and the leadership in Beijing.<sup>361</sup>

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<sup>356</sup> See, e.g., *Tung Chee-hwa's Remarks Are Beneficial to Hong Kong's Prosperity*, *supra* note 238, at A4; *Tung in a Legal Tangle*, S. CHINA MORNING POST, Jan. 25, 1997, at 17 (connecting Tung's arguments about Hong Kong people's values with reaction to his position on the Bill of Rights and related reforms).

<sup>357</sup> *Tung Chee-hwa's Remarks Are Beneficial to Hong Kong's Prosperity*, *supra* note 238, at A4.

<sup>358</sup> Humphrey, *supra* note 204; see also *Martin Lee Humbles Himself in the United States*, TA KUNG PAO, Apr. 17, 1997, at A4 (criticizing Martin Lee for having "implored" U.S. politicians to "meddle in Hong Kong's affairs" and to help prevent amendments to the Societies and Public Order ordinances).

<sup>359</sup> Yeung, *supra* note 323, at 15.

<sup>360</sup> See *Tung Chee-hwa's Remarks Are Beneficial to Hong Kong's Prosperity*, *supra* note 238; Humphrey, *supra* note 205; Yeung, *supra* note 323, at 15.

<sup>361</sup> See *Full Text of Questions and Answers at Tung Chee-hwa's News Conference for Chinese, Foreign Reporters in Beijing*, *supra* note 340 (quoting Tung's statement that "[w]e must remember that Hong Kong's long term interests are consistent with China's" and "all Hong Kong people, regardless of

China and its closest Hong Kong supporters in the battle over ordinary Hong Kongers' opinions did not preach infinitely flexible accommodation of the preferences, or even the interests, of the Hong Kong people with respect to the Chief Executive issue. As with the other issues of the endgame, the Chinese and pro-China position here too assumed that an answer to the key legal and institutional questions that would be adequate for the Hong Kong people also could be compatible with China's conception of law and sovereignty. An insistence on positivist principle was never far from the surface of P.R.C. and pro-China Hong Kong arguments concerning the Chief Executive controversy. Although presented in ways that sought to reflect or to inculcate favorable attitudes among the Hong Kong people, the Chief Executive selection process, its outcome, and the powers of the office remained the products of Chinese sovereign action.

As the framework documents and official and unofficial comments made clear to people in Hong Kong, China and its allies regarded the office of Chief Executive and the Selection Committee as creatures of P.R.C. statutes. The staffing of the Selection Committee and the appointment of the Chief Executive-designate were the actions of P.R.C. or P.R.C.-established bodies. The underlying policies of according Hong Kong some form of democracy (in the Chief Executive Selection process and more generally), and of having Hong Kong people rule Hong Kong (whether as Chief Executive or in lesser offices) were discretionary choices and grants of authority from the P.R.C.<sup>362</sup>

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their viewpoints, should be united" and "reach a consensus on cooperation"); Kwang, *supra* note 344, at 8 (quoting comments of a member of the political sub-group of the Preliminary Working Committee who noted that many Hong Kong inhabitants had "a mental block about China" and that the Chief Executive needed to be able to promote mutual understanding between Hong Kong and China).

<sup>362</sup> See Basic Law, *supra* note 21, pmbl. (stating that the Basic Law is a statute enacted by the P.R.C.'s National People's Congress); *id.* arts. 43-51 (providing for the existence, powers, criteria of eligibility, and method of selection and appointment of the Chief Executive); *id.* art. 68, annex II (providing for the constitution of the legislature by elections); *id.* annex I (providing the method for selection of the Chief Executive); Joint Declaration, *supra* note 39, annex I, pmbl., annex I, § II (elaborating "the basic policies of the People's Republic of China regarding Hong Kong," including those of "establish[ing] the Hong Kong Special Administrative Region," providing a "government and legislature composed of local inhabitants," and selecting the chief executive through election or consultation and the legislature by elections); *id.* § 3(4) (providing that "[t]he Government of the People's Republic

### 3. RULE-OF-LAW VALUES (II) — THE BATTLE OVER HONG KONG'S BUSINESS COMMUNITY

#### 3.1. *The Business Community and Prosperity*

In addition to their struggles to win over the Hong Kong people, the principal parties to the political wrangling over Hong Kong's future laws and institutions also fought over a narrower and more elite segment of Hong Kong society: the business community. Here, too, each side sought to claim that its preferred solutions to the issues of the endgame coincided with what the target group wanted, needed, or could be convinced to demand. The business community, particularly Hong Kong's major local firms and multinational enterprises with a substantial presence in the territory, received special attention in the contest to shape the S.A.R.'s order for an important, if obvious, reason: the confidence and support of the business community, which had been so vital to the territory's past economic success, looked to be the key to future prosperity as well.

#### 3.1.1. *Business and the Politics and Government of an "Economic" City*

The relatively elite business community arguably has had a more dominant role in Hong Kong than have business communities in most other countries. The business community has been especially central to the territory's economic life. For decades preceding the end of colonial rule, Hong Kong's government followed a policy of "positive non-interventionism."<sup>363</sup> Regula-

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of China declares that the *basic policies of the Peoples Republic of China* regarding Hong Kong" include that "[t]he Chief Executive will be appointed by the Central People's Government on the basis of the results of elections or consultations" in Hong Kong and that the government "will be composed of local inhabitants" (emphases added); *N.P.C. Decision*, *supra* note 21 (providing for the nomination of the first Chief Executive by a Selection Committee chosen by a Preparatory Committee established by the N.P.C.); *see also supra* notes 353-55 and accompanying text (suggesting the limits to accommodation of popular preferences).

<sup>363</sup> *See generally* STEPHAN HAGGARD, *PATHWAYS FROM THE PERIPHERY* 151-57 (1990) (discussing "positive non-interventionism.") "Positive non-interventionism," although coined by Philip Haddon-Cave, who served as Hong Kong Financial Secretary from 1971 to 1981, nonetheless captures a general policy that pre-dated and survived his tenure. *See id.* at 151.

tion of business activities and international trade was minimal, mostly limited to helping provide the certainty and transparency on which markets depend.<sup>364</sup> Until the recent establishment of the Hong Kong Monetary Authority, there had not been a distinct public entity that performed many of the major functions of a central bank. A handful of elite banks have issued the territory's currency.<sup>365</sup> Hong Kong also has had nothing resembling the elaborate state industrial policies that have characterized other East Asian "tiger" economies.<sup>366</sup> Affirmative government involvement in the economy concentrated on general support for business activities (investments in housing, infrastructure, and trade promotion), rather than company- or industry-specific subsidies, state ownership of productive enterprises, or protectionism.<sup>367</sup>

"Business" seemed to dominate the life of the territory so thoroughly that the practices and norms of commerce and the business community did much to define the Hong Kong "systems" that the legal arrangements for the transition pledged to preserve. This is likely a reflection of Hong Kong's success in creating wealth and its failure in fostering alternatives to business as the central element of Hong Kong society. The territory's rapid rise as a major regional and global economic hub — a home base for several business empires, host to branches of the largest international firms, the world's eighth largest trading entity, and an economy with per capita incomes rivaling those in the industrialized West — naturally made the territory's leading business elites a focal point of Hong Kong's identity.<sup>368</sup>

At the same time, a population made up largely of immigrants with a relatively weak sense of a distinct local cultural identity and a colonial system of government that precluded development

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<sup>364</sup> See MINERS, *supra* note 6, at 47-49 (discussing Hong Kong's ideology of minimal interference in economic activity).

<sup>365</sup> On monetary policy, financial regulation, and the Hong Kong Monetary Authority, see, for example, Lui Yu-hon, *Banking, Monetary Affairs and Developments of Financial Markets*, in FROM COLONY TO SAR: HONG KONG'S CHALLENGES AHEAD, *supra* note 6, at 151-75.

<sup>366</sup> See HAGGARD, *supra* note 363; MINERS, *supra* note 6.

<sup>367</sup> See *supra* note 366.

<sup>368</sup> See, e.g., HONG KONG GOV'T INFO. SERVICES, *supra* note 3, at 47-58, 79-81; Tang, *Hong Kong in Transition: Globalization Versus Nationalization*, in THE CHALLENGES OF HONG KONG'S REINTEGRATION WITH CHINA, *supra* note 7; deLisle, *supra* note 27, at 72-73, 75-76.

of a strong local political leadership meant that economic elites would have few rivals. Tycoons (in addition to the governor and the ubiquitous movie stars) were late colonial Hong Kong's leading celebrities. Business leaders were also the principal figures in Hong Kong politics for much of the colony's recent history. Prominent businesspeople and senior members of a pro-business civil service whose ethos was anti-regulatory filled the Executive Council and the Legislative Council — especially prior to the electoral reforms of the 1990s.<sup>369</sup> True political parties formed and brought to the fore many more leaders drawn from the ranks of the territory's lawyers, teachers, journalists, unionists, and academics only in the aftermath of Tiananmen and with the introduction of broad-based elections for Legco.<sup>370</sup> Thus, at the beginning of Hong Kong's endgame, a top Chinese official could credibly characterize Hong Kong as an "economic" rather than a "political" city.<sup>371</sup>

Not surprisingly, the parties to the political clash over Hong Kong's future saw the business community's actions and reactions as crucial to the fate of any proposed answers to the legal and institutional questions of Hong Kong's transition to Chinese rule. Tellingly, business concerns caused Britain to raise the issue of Hong Kong's post-1997 status more than a decade and a half

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<sup>369</sup> See generally MINERS, *supra* note 6, at 114-20 (discussing Hong Kong's pro-business functional constituency electoral system and stating that "nowhere else except in Hong Kong is the largest block of seats in the legislature set aside to secure special representation for the richest and most privileged sectors of the community"); IAN SCOTT, *POLITICAL CHANGE AND THE CRISIS OF LEGITIMACY IN HONG KONG* (1989); Stacy Mosher, *The Governor's Men*, FAR E. ECON. REV., Oct. 3, 1991, at 11 (discussing the appointment of conservative, establishment figures to Hong Kong's Legislative Council); Stacy Mosher, *Out of the Club*, FAR E. ECON. REV., Nov. 7, 1991, at 12 (describing the appointment of conservative members to the Executive Council); Mosher, *supra* note 235, at 17 (noting that Hong Kong's electoral system reserves two-thirds of the seats in the legislature to "well-entrenched" interests).

<sup>370</sup> See, e.g., Lee, *supra* note 17; Sonny S.H. Lo, *Legislative Cliques, Political Parties, Political Groupings and Electoral System*, in FROM COLONY TO SAR: HONG KONG'S CHALLENGES AHEAD, *supra* note 6, at 51-70; So, *supra* note 17.

<sup>371</sup> See Louise do Rosario, *Future Shock*, FAR E. ECON. REV., May 19, 1994, at 24 (quoting Lu Ping, director of the State Council's Hong Kong and Macau Affairs Office, as saying "Hong Kong has always been an economic city, never a political city"); Stormont, *supra* note 293 (quoting Xinhua Hong Kong director Zhou Nan affirming Lu Ping's point); see generally LAU & KUAN, *supra* note 1, at 63-118 (describing economic and political attitudes and the relatively low levels of engagement with political issues).

earlier: with the colonial government unwilling to grant developers leases extending beyond the expiration of the New Territories' ninety-nine-year lease, business interests grew nervous about making investments that would require more than fifteen years to recoup.<sup>372</sup> A shared sense that business interests were important and had to be accommodated was also evident in the aftermath of Hong Kong Governor MacLehose's and Deng Xiaoping's first formal discussion of the reversion issue in 1979: the one element of Deng's response made immediately public was his message to members of Hong Kong's business community that they should "set their hearts at ease."<sup>373</sup>

This solicitude for business interests reflected a recognition on both sides of the principal political divide in pre-reversion Hong Kong that the business community could make the territory wither if business elites found the legal and institutional arrangements for the transition unacceptable. Although "losing the people" might raise the prospect of a flight of political refugees or a harsh political crackdown, significant capital flight and a severe economic slowdown could be equally devastating to the territory's stability and prosperity. In addition, there was reason to think that a fall in seemingly high, but potentially volatile, business confidence presented a more credible threat to Hong Kong's future than did a ruinous rise of popular discontent.

By the 1990s, a considerable share of Hong Kong's most prominent firms had re-registered in offshore locations that would be immune from the dangers of legal decay in Hong Kong. Anecdotal evidence and common sense indicated that local individuals and firms with large liquid assets had made contingency plans to move funds — and their business operations — safely

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<sup>372</sup> Under the 1898 Convention of Peking, China granted Britain a ninety-nine year lease on the New Territories, includes more than 90% of Hong Kong's current territory. The government's policy on leases was economically important because nearly all land in the territory is held as long-term leases from the government. By the 1980s, most of the open land available for major development projects was in the New Territories. However, projects in the more densely developed and smaller areas that Great Britain claimed to have a legal right to occupy in perpetuity (under the treaties ceding Hong Kong Island and Kowloon) were implicated as well because the British authorities had long pursued a policy of treating the ceded territories and the leased New Territories as part of a single integrated colony.

<sup>373</sup> On this early phase of the negotiations, see, for example, ROBERT COTTRELL, *THE END OF HONG KONG* 58-64 (1993); PERCY CRADOCK, *EXPERIENCES OF CHINA* 161-68 (1994); SCOTT, *supra* note 369, at 167.



out of Hong Kong in the event of a crisis.<sup>374</sup> The same was true of international companies in Hong Kong, which comprise a large and important segment of the business community. With a long list of competing locations eager to lure away international capital and regional or global headquarters, a realistic exit option was in place for most of Hong Kong's key economic elites.<sup>375</sup>

Recognizing that legal and institutional arrangements that promised to provide the requisites of continued prosperity were crucial to convince business elites not to exercise their flight option, the colonial authorities and Beijing gave business leaders prominent roles in the process of crafting Hong Kong's post-reversion order. Business interests continued occupy the lion's share of the seats in Exco (the only Hong Kong entity formally briefed about the progress of the talks leading to the Joint Declaration) and Legco, and to enjoy other reliable channels of influence with the colonial government through chambers of commerce and industry groups.<sup>376</sup> Leading figures in Hong Kong's business community also engaged in frequent informal discussions with Chinese leaders and were appointed to all the formal bodies established to make arrangements for the S.A.R., including the Basic Law Drafting and Consultative Committees, the Preliminary Working Committee, the Preparatory Committee, and the Selection Committee for the S.A.R.'s first Chief Executive.<sup>377</sup> The business-heavy Selection Committee proceeded to

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<sup>374</sup> See Carol Kennedy, *Can Two Hongks Get It Right?*, DIRECTOR, Feb. 1996, at 34-40 (quoting Jardines former director Nigel Rich); Michael Steinberger, *Pact on HK's Legal System Has Not Put Fears to Rest*, BUS. TIMES, Aug. 9, 1995, at 8.

Fearing how Hong Kong take-over and merger laws might be used against it after 1997, Jardines delisted on the Hong Kong stock exchange after its request for a formal exemption was denied. See *Hong Kong: Business Community Maintaining Optimism Despite Uncertainty About Its Future Post 1997*, EUROMONEY SUPPLEMENT, July 16, 1991 (describing Hong Kong and Shanghai Bank's restructuring under a UK holding company in 1991); Ian K. Perkin, *Primary Listing Is Now London, Says Jardines*, S. CHINA MORNING POST, June 8, 1991.

<sup>375</sup> See Bruce Gilley, *Just in Case . . .*, FAR E. ECON REV., Aug. 8, 1996, at 53; Henny Sender, *Politics, Not Profits*, FAR E. ECON REV., Dec. 17, 1992, at 20; Gary Silverman, *The Price of Success*, FAR E. ECON REV., July 6, 1995, at 54; Michael Steinberger, *Companies Ring-Fence Assets in Hong Kong Twilight Raid*, TIMES (London), Aug. 4, 1995.

<sup>376</sup> See MINERS, *supra* note 6, at 114-20.

<sup>377</sup> See Chan, *Democracy Derailed in the Hong Kong Basic Law*, in THE HONG KONG BASIC LAW: BLUEPRINT FOR STABILITY AND PROSPERITY UNDER CHINESE SOVEREIGNTY? 3-35. More than half of the Hong Kong slots

nominate prominent businessman Tung Chee-hwa as the initial occupant of the S.A.R.'s top post and to elect many business and pro-business candidates to the Provisional Legislature.

Providing these opportunities for business to make its demands and preferences heard was but one front in a political battle to claim and cultivate the loyalty of business interests. All major parties in the political battle over Hong Kong's future order recognized that a prosperity-sustaining solution for the problems of Hong Kong's transition required a rule of law satisfactory to the territory's business interests. Accordingly, the key political players undertook extensive efforts to characterize, influence, and predict this key group's preferences and requirements in ways that were compatible with the divergent conceptions of the rule of law and institutions that China, the colonial authorities, and emergent Hong Kong politicians of all stripes saw as desirable, or at least minimally acceptable. This battle over the elite business community, like the broadly similar struggle over the people, was a central feature of the endgame politics of shaping Hong Kong's legal and institutional order beyond reversion.

### 3.1.2. *Variety and Fragmentation in Hong Kong's Business Community*

The elite business community that formed the focus of this conflict was itself quite diverse. Its Hong Kong-based components included venerable *hongs* founded in the days of the opium trade and often led by their founding families or fellow expatriates.<sup>378</sup> The business community also included conglomerates and far-flung holding companies dominated by Hong Kong Chinese tycoons.<sup>379</sup> Ethnic Chinese leaders of Hong Kong business

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on the Preparatory Committee, which was established in 1996 to handle critical transition-related tasks, went to business leaders, as did half the seats on the committee that nominated and elected the S.A.R.'s first chief executive. See *N.P.C. Decision*, *supra* note 21; Bruce Gilley, *Down to Brass Tacks*, FAR E. ECON. REV., Jan. 25, 1996, at 14-15.

<sup>378</sup> See, e.g., Kennedy, *supra* note 374, at 34-40 (describing the management of Swire and Jardines); Henny Sender, *Fixed Assets*, FAR E. ECON. REV., July 8, 1993, at 22 (contrasting the different image and style of Hong Kong's leading *hongs* Jardine Matheson and Swire Pacific).

<sup>379</sup> See Garth Alexander, *Hong Kong's Top Taipans Get Ready for Takeover*, TIMES (London), Oct. 3, 1993, § 3, at 8 (noting the change in leadership at some large Hong Kong firms from British to Hong Kong Chinese management in preparation for the hand-over); *Hutchison Whampoa Sets New \$2bn HK*

included heads of well-established companies and fast-rising entrepreneurs.<sup>380</sup> This "Chinese" segment of the elite business sector took in some scions of pre-revolutionary Shanghai's leading commercial families, others who were more purely Hong Kongese or Cantonese, and a handful who had struck roots in the diaspora of "overseas Chinese" in Southeast Asia.<sup>381</sup> Some of the Chinese establishment's members had been educated in the United States or Britain while others followed the more insular mode of the traditional *taipan*.<sup>382</sup> The business community's fully "foreign"

*Benchmark*, EUROWEEK, July 15, 1997, at 1, 14 (describing Li Ka-shing's Hutchison Whampoa as Hong Kong's second largest company, measured by capitalization, and as one of Hong Kong's most diversified business groups with interests in many sectors and countries); Jake Lloyd Smith, *Mixed Reaction to HSI Reshuffle*, S. CHINA MORNING POST, July 18, 1997, Business, at 1 (similarly describing Li Ka-shing's business empire); see generally *Who's Who in Hong Kong — Tycoons at a Glance*, Reuters, May 15, 1997, available in LEXIS, Asiapc Library, Allasi File.

<sup>380</sup> See, e.g., Owen Hughes, *Who's Who*, S. CHINA MORNING POST, Nov. 27, 1994, Magazine, at 21 (describing Peter Woo, who succeeded his father-in-law, Sir Y.K. Pao, as chairman of the giant Wharf and Wheelock groups); John Ridding, *People: Hong Kong Telecom Chief in Focus*, FIN. TIMES (London), Apr. 15, 1996, at 9 (describing Linus Cheung, the first ethnic Chinese head of Hong Kong's monopoly telecommunications service provider); Nick Rufford, *Hong Kong Tycoon Refuses To Kowtow*, SUNDAY TIMES (London) Mar. 24, 1996, (describing former clothing entrepreneur and *Apple Daily* and *Next Magazine* publisher Jimmy Lai as a "former street urchin" and "self-made millionaire"); *Thumbnail Sketches of Potential Hong Kong Leaders*, Reuters, Nov. 16, 1996, available in LEXIS, Asiapc Library, Allasi File; *Who's Who in Hong Kong — Tycoons at a Glance*, *supra* note 379 (noting Linus Cheung's modest beginnings as a goldsmith's apprentice and his rise at Cathay Pacific, Hong Kong's principal airline).

<sup>381</sup> See *Asia, Profile: The Private Life of Robert Kuok*, Reuters, Feb. 19, 1997, available in LEXIS, Asiapc Library, Allasi File (describing the business empire, in Hong Kong and elsewhere of Malaysian-born ethnic Chinese tycoon Robert Kuok); Lee Han Shih, *A Tale of Two Tycoons: Kuok, Khoo Set To Expand Media Groups*, BUS. TIMES (Singapore), Feb. 24, 1996, at 6 (describing Robert Kuok's role in the media business in Hong Kong and China); Melinda Liu, *Revenge of the Refugees*, NEWSWEEK, May 19, 1997, at 36 (describing Run Run Shaw, Tung Chee-hwa's father and other Shanghainese who became members of Hong Kong's business elite); *Who's Who in Hong Kong — Tycoons at a Glance*, *supra* note 379 (describing Linus Cheung as of Hong Kong origin); Sondra WuDunn, *Ho in Strategic Mainland Investment*, S. CHINA MORNING POST, Jan. 31, 1993, at 1 (describing the business ventures of Hong Kong-born casino magnate Stanley Ho).

<sup>382</sup> See Edward A. Gargan, *A Master Builder for Asia's Future*, N.Y. TIMES, Aug. 17, 1994, at D1 (describing Princeton-educated property developer Gordon Wu); Barry Porter, *Hong Kongers with the Midas Touch*, S. CHINA MORNING POST, July 23, 1994, Review, at 4 (describing Li Ka-shing as having only a high

or "international" segment included leading firms from around the world, most notably those from the United States, Great Britain and Japan.<sup>383</sup>

The territory's major companies also varied in their key revenue sources. By the late 1980s, some were heavily dependent on investments in China, while others relied significantly on Hong Kong sources of income. Still others used Hong Kong primarily as a base for regional or global operations.<sup>384</sup> Key companies were also concentrated in significantly different economic sectors. These ranged from relatively low-tech manufacturing, based in thousands of factories in China's Guangdong province, to cutting-edge financial and investment services for capital flowing to and from all corners of the world.<sup>385</sup> In between, Hong Kong's traditionally preeminent activity as a hub of international trade in manufactured goods remained a major line of business for some of the territory's leading firms. A more recent mainstay of the economy, namely property and infrastructure development both in the territory and in China, was at least

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school education and Walter Kwok as one of three brothers educated at British Universities who inherited their father's business empire).

<sup>383</sup> See, e.g., Tang, *supra* note 7, at 184; Gilley, *supra* note 375, at 53.

<sup>384</sup> See *Hutchison Whampoa Sets New \$2bn HK Benchmark*, *supra* note 379 (describing Li Ka-shing's Hutchison Whampoa as one of Hong Kong's most diversified business groups with interests in many sectors and countries); Kennedy, *supra* note 376 (describing Swire's continuing focus on regional business and Jardines' quest to become an Asian-based multinational corporation); Gargan, *supra* note 384 (describing the dependence of Gordon Wu's Hopewell Holdings on massive infrastructure projects in mainland China); Barry Porter, *Sino To Make Its Debut in Infrastructure with Port Venture in Dalian*, S. CHINA MORNING POST, Aug. 30, 1996, at 1 (describing Robert Ng's Sino-Land's recent move outside of its traditional specialty, property development in Hong Kong); Porter, *supra* note 384 (describing Sino-Land as a Hong Kong property development company).

<sup>385</sup> See *supra* note 384; see also Tang, *supra* note 28, at 125-27 (describing the shift of Hong Kong manufacturing to Guangdong and possible responses to it); Hughes, *supra* note 380 (describing Sir Y.K. Pao's shipping-based Wharf and Wheelock companies); Liu, *supra* note 381 (describing Tung Chee-hwa's family shipping firm); John Ridding, *HK Manufacturers Seek a Higher Profile*, FIN. TIMES (London), Mar. 14, 1997, at 3 (quoting heads of manufacturing-based companies as favoring industrial policies to support revival of manufacturing in Hong Kong). The financial services sector is one of Hong Kong's largest and fastest growing, and includes many internationally prominent institutions such as the Hong Kong and Shanghai Bank and the Bank of East Asia. See generally HONG KONG GOV'T INFO. SERVICES, *supra* note 3, at 51-52, 70-92; Lui, *supra* note 365.

equally important for many of the business community's key players.

The visible political leanings of Hong Kong's business elites ranged widely as well. At one extreme stood the unabashedly liberal and democratic commitments of one-time clothing entrepreneur and *Next Magazine* and *Apple Daily* publisher Jimmy Lai.<sup>386</sup> A bit closer to the center was former head of the General Chamber of Commerce and Legco member Jimmy McGregor, whose support for political reform made him the target of a successful campaign by pro-China firms to secure his ouster, despite McGregor's having urged moderation and compromise in disputes over democratization and arrangements for the judiciary.<sup>387</sup> At the other extreme were the relentlessly bullish and strongly "pro-China" views (as the press routinely labeled them) of real estate developer David Chu.<sup>388</sup>

Many of the territory's leading tycoons and its most prominent businessmen-politicians occupied shifting positions between these poles. Their political commitments often seemed simply to track their current assessments of what would be best for their businesses. For the territory's Western-based business elites, positions on the issues of the transition presumably reflected additional considerations. These factors included the pressure of political views (whether their own or those of their customers, shareholders, or governments) rooted in their home countries, and a sense that as expatriates they were not proper players in the territory's political struggles.<sup>389</sup> As well-connected or state-owned P.R.C.-based companies became major participants in the Hong Kong economy, the political views of the Hong Kong

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<sup>386</sup> See Rufford, *supra* note 380.

<sup>387</sup> See *Bitter Battle for the Business Seat*, S. CHINA MORNING POST, June 13, 1991 (describing McGregor's generally liberal leanings and quoting his moderate view that "we must minimise the possibilities of confrontation and maximise the opportunities for consensus").

<sup>388</sup> See, e.g., Andrew Neil, *Hong Kong Surprise*, VANITY FAIR, Mar. 1997, at 165-66.

<sup>389</sup> See *infra* sections 3.2 and 3.3; deLisle & Lane, *supra* note 21 (citing several examples of views expressed by indigenous and expatriate business elites); cf. Timothy A. Gelatt and Diane F. Orentlicher, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 J. INT'L L. BUS. 66 (1993) (discussing how political and legal pressures at home have affected Western multinationals' approaches to investment in China and other countries with poor human rights records).

business community became more varied and complex. Mainland firms emerged as a shadowy but important group, at times inclined or required to hew to a "pro-China" line.<sup>390</sup> While purely P.R.C. companies were often implicitly excluded from the focus of the endgame's political conflict over "business," mainland firms' acquisition of substantial interests in major Hong Kong companies made the former's positions relevant even in a struggle that focused on a "business community" defined more narrowly to include only "Hong Kong" or "multinational" firms and their local leaders.<sup>391</sup>

Such considerable variety in the interests and views of leaders of "the business community" helps to explain why both pro-China and liberal forces were able to find comforting evidence and claim victories in the political battle over the rule-of-law values and legal and institutional preferences of Hong Kong's business elite. Basic differences in political orientation, economic-sectoral and geographic concentration, cultural background, and even nationality were likely to produce fault lines dividing the business community along several dimensions, including: inclinations to support any particular position on key rule-of-law-related questions, abilities to exercise an exit option in the event of a "bad" answer to those questions, and capacities to survive and thrive under any particular version of the "rule of law" that emerged for post-reversion Hong Kong.

Despite this diversity and apparent potential for division in the territory's business circles, the major participants in the battle over business cast their arguments and claims predominantly in terms of an undifferentiated "business community." The only significant exceptions to this pattern were occasional arguments that focused specifically on the territory's international business community. That the P.R.C., the British and colonial governments and Hong Kong political leaders and activists made so little public effort to target smaller segments of the business world or

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<sup>390</sup> See Bruce Gilley, *Great Leap Southward*, FAR E. ECON. REV., Nov. 23, 1995, at 60 (discussing China's rumored issuance of a directive to Chinese firms in Hong Kong to increase purchases of businesses and real estate as a means of shoring up economic health and confidence in Hong Kong and smoothing the transition to Chinese rule); see also Henny Sender, *Cash Dispenser*, FAR E. ECON. REV., Oct. 22, 1992, at 26 (describing P.R.C. entities as increasingly powerful presences in Hong Kong's economy).

<sup>391</sup> See Gilley, *supra* note 390, at 60; Sender, *supra* note 390, at 26.

to secure the backing of particular sectors of the elite business community — even as they turned to threats and blandishments aimed at the business community as a whole — underscores the peculiar political character of the efforts to assert or enlist business backing in the endgame struggle to shape future Hong Kong laws and institutions. For the principal participants in that struggle, the basic clash of visions of law and sovereignty drove and defined the battles over the business constituency, even to the near exclusion of the ordinary politics of building seemingly promising coalitions.

### 3.2. *Business and the British, and Hong Kong Liberal-Democratic Vision of the Rule of Law*

During the last years before reversion, British colonial authorities and Hong Kong's pro-democracy and liberal political leaders claimed that Hong Kong's business community did or must support the rule of law, in large part because it was vital to prosperity. Hong Kong's Financial Secretary Donald Tsang asserted that "the rule of law is absolutely important, . . . [a] pillar[] underpinning Hong Kong's success, and the nature of . . . Hong Kong-style capitalism."<sup>392</sup> Speaking to a business audience, Governor Patten similarly argued that "the rule of law is not an optional extra. . . . It is what makes Hong Kong different, it is what makes Hong Kong successful . . . without it, a lot of you would not be here."<sup>393</sup>

On this view, the decline of the rule of law would spell economic disaster for Hong Kong and bring harm to the members of its business community. Martin Lee warned the business community that if Hong Kong's rule of law suffered "erosion," "business [would] no longer be conducted freely and fairly," and "the health of the economic development in Hong Kong" would be in jeopardy.<sup>394</sup> Patten cautioned that if "[y]ou take away the rule of law," major international firms doing business in Hong

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<sup>392</sup> "We Just Cannot Go Back," EUROMONEY, Sept. 1996, at 84. Tsang listed "freedom of the press, freedom from corruption in public service, the rule of law and a level playing-field" as the "four pillars." *Id.*

<sup>393</sup> Chris Yeung & Genevieve Ku, *Patten Tells Businessmen To Stand Up for Autonomy*, S. CHINA MORNING POST, Oct. 11, 1996, at 1.

<sup>394</sup> Martin Lee, *Hong Kong: One Country, No System?*, S. CHINA MORNING POST, Dec. 14, 1989, at 27.

Kong would "be off to Taipei or Seoul or Tokyo."<sup>395</sup> More broadly, colonial officials' and liberal politicians' frequent assertions that a failure to secure the rule of law for post-reversion Hong Kong would leave the people worried, disaffected and restive were addressed, in significant part, to a business community that would presumably understand that deleterious economic effects would follow from social instability or an exodus of human capital.

The officials and politicians who made these arguments envisioned a business-supported and business-supporting rule of law of a particular type, although they differed over several crucial questions of legal and institutional detail. They adopted the position that a legal order sufficient to satisfy the wants and needs of Hong Kong business would have to include clear rules for economic behavior, administered and interpreted by fair and neutral judicial and executive officers, and subject to amendment by institutions that made and changed the laws in open, reasoned and regularized ways. As was apparent in the battles over the Hong Kong people's attitudes toward the rule of law, some of the territory's most ardent pro-democracy leaders claimed that these minimum conditions of legality needed to be undergirded by democratic and locally accountable government institutions. This perspective, including some of the variations within it, was reflected in the general comments that Patten, Tsang, Lee and others made concerning the business community's values and interests and the rule of law. It was also consistent with the arguments that they and other British and Hong Kong officials and liberal and pro-democracy politicians deployed in their struggles to claim or capture the allegiance of the Hong Kong people. This consistency was perhaps politically and tactically necessary, given the impossibility of achieving an acoustical separation between arguments nominally addressed to "the people" and to "the business community."

The parallels between the arguments that these key political players pressed with respect to the people and with respect to business also had more principled underpinnings, however, in the liberal-democratic and natural-law-like conception of domestic legal authority that British and colonial officials and many of the

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<sup>395</sup> H.D.S. Greenway, *Borrowed Time*, BOSTON GLOBE, June 20, 1993, Magazine, at 24 (quoting Governor Patten).



territory's leading legislators and politicians broadly shared. At a general level, this conception of legality and sovereignty did not, and perhaps could not, differentiate sharply between what was right and necessary for a rule of law for different groups in Hong Kong. More subtle questions of what a liberal-democratic perspective, and the Hong Kong business community, might require of a rule of law — and intramural disagreements among the perspective's adherents over such issues — emerged in the endgame battles over business attitudes toward the major concrete questions of laws and institutions for the S.A.R.

### 3.2.1. *The Bill of Rights and the Value of Civil Liberties*

In enacting the Bill of Rights Ordinance and amending other Hong Kong laws to enhance protection of civil and political liberties, the colonial government and liberal Hong Kong politicians were able to gain support from business elites in the wake of the Tiananmen Incident. They pointed to what the brutal repression of the 1989 democracy movement in the mainland seemed to portend for post-1997 Hong Kong, and to the public outrage and fear that the events in Beijing had triggered in the territory. The Hong Kong government and political leaders supporting a Bill of Rights thus raised the specter of a prosperity-undermining loss of confidence and stability unless the government took dramatic action. With the public deeply worried about the future and with some prominent business leaders having expressed support for the Chinese student demonstrators, significant segments of the indigenous business elite initially backed the enactment of more robust and liberal civil and political rights laws for Hong Kong.<sup>396</sup> In an especially striking instance of business support for rights-protecting legal reforms, business and pro-business members of the Basic Law Consultative Committee proposed changes to the Basic Law to restrict Beijing's power to declare a state of emergency in Hong Kong, clarify the scope of acts of state that were to be beyond the S.A.R. courts' domain, entrench international covenants on human rights in the Basic Law, and give Basic Law provisions a status in P.R.C. law

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<sup>396</sup> See, e.g., Lau, *supra* note 16, at 18 (noting generally pro-business Legco and Exco members' and business leaders' heightened support for greater democratic reforms).

comparable to the provisions of China's state constitution.<sup>397</sup>

In light of the public reaction in Western capitals to the events at Tiananmen, the colonial government and Hong Kong's liberal activists also could rely on the support or acquiescence of the territory's international business community as they pursued reforms in Hong Kong's laws that imposed illiberal restrictions on civil and political rights. Ultimately, the Bill of Rights Ordinance passed Legco without significant business opposition.<sup>398</sup> After the enactment of the Bill of Rights Ordinance, proponents of a liberal legal regime for civil liberties worked to cultivate business support throughout the early and middle 1990s. They did so primarily by linking the Bill of Rights, and other legal reforms that they deemed essential for a just and adequate rule of law, to the advancement or preservation of the business community's assumed interests, especially its material interests. For example, prominent barrister and, later, Solicitor General Daniel Fung argued that business should welcome the Bill of Rights, not fear it as a "pinko-liberal document."<sup>399</sup> The Bill of Rights, Fung explained, provided new ways for the territory's avowedly pro-market business community to challenge government regulation.<sup>400</sup>

More generally, Hong Kong government officials and pro-democracy politicians argued that some of the rights protected by the controversial Bill of Rights and other liberal amendments to prior laws were in business' interest and that business should recognize this feature. Martin Lee asserted that freedom of the press and freedom of information were "things that the business community knows they need."<sup>401</sup> The protection of these freedoms, Lee added, was necessary for the preservation of "legal integrity" upon which the protection of contracts and property

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<sup>397</sup> See *Hong Kong: Group's Plan Tackles Flaws in Basic Law*, S. CHINA MORNING POST, Sept. 6, 1989.

<sup>398</sup> Indeed, some segments of the business community appear to have reacted negatively to China's initial opposition to the Bill of Rights, seeing in it a possible threat to the vital independence of commercial law after 1997. See *Hong Kong: Business Community Maintaining Optimism Despite Uncertainty About Its Future Post 1997*, *supra* note 374.

<sup>399</sup> See Gareth Hewett, *Hong Kong: Bill of Rights Poses Risks for "Uneducated" Businesses*, S. CHINA MORNING POST, Nov. 12, 1991.

<sup>400</sup> See *id.*

<sup>401</sup> *For Many Corporate Chiefs, 1997 Cannot Come Soon Enough*, ASIAWEEK, Dec. 7, 1994, at 23.

also depended.<sup>402</sup> Governor Patten similarly claimed that there was a clear "relationship between . . . a free press, and the rule of law and Hong Kong's prosperity" that some people in the business community would fail to recognize at their peril.<sup>403</sup> Articulating the claimed connection more fully, Hong Kong liberals argued that, without the kind of protection the Bill of Rights provided for "political" freedoms such as free expression, business could not have confidence in the reliability and completeness of economically relevant information that was vital to commerce and investment.<sup>404</sup>

Perhaps perceiving that purely economic arguments for the Bill of Rights and civil liberties laws seemed to fail to convince the territory's business elites, colonial government officials and liberal politicians sought to appeal to business leaders' non-economic preferences as well. Specifically, they invoked views, assertedly prevalent in the business community, that were consistent with the requisites of the liberal-democratic rule of law that they embraced. Faced with apparently low levels of support for his agenda in the business community, Patten argued:

There is hardly a well-off businessman in Hong Kong who doesn't want, for himself, the insurance of being able to live in a free society . . . . So I can't believe that those businessmen don't understand the relationship between the rule of law, between the values of pluralism, and being

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<sup>402</sup> *Id.*; see also Clarence Tsui, *HK Politicians Urged To Avoid "Damaging" Talk*, S. CHINA MORNING POST, Jan. 30, 1997, at 4 (quoting Martin Lee's comment that, "[i]f you are a businessman, you need precise and reliable economic information").

<sup>403</sup> Greenway, *supra* note 395, at 14. Comments from the business community offered some support for this position. See Louis Lucas, *Hong Kong Hopes for a Calm Voyage*, EUROMONEY, Sept. 1995, at 441-66 (quoting Hong Kong Stock Exchange Chairman Edgar Cheng Wai-kin's statement that "Hong Kong's role as a regional centre for raising foreign capital" requires "making sure there is freedom of flow of information and also the rule of law" after 1997).

<sup>404</sup> See *Hong Kong's Lee Defies Colony's Future Leader*, Reuters, Feb. 19, 1997, available in LEXIS, Asiapc Library, Allasi File (quoting Martin Lee); Duncan Hughes, *HK's Prosperity Dependent of Free Data Flow*, S. CHINA MORNING POST, May 30, 1997, Business, at 2.

able to live a decent life.<sup>405</sup>

Martin Lee similarly asserted that, "[b]usiness people all cherish their freedom more than anything else" and, therefore, could hardly welcome a situation in which "[f]reedom will no longer be protected by law."<sup>406</sup>

When the P.R.C. became more shrill and intransigent in its threats to strike key provisions in the Bill of Rights and reverse amendments to colonial legislation that previously had restricted freedom of association and public demonstrations, British authorities and Hong Kong liberals reiterated and extended their grim predictions about what the absence of such robust legal protections could mean for business and for Hong Kong. Many of the dire warnings from Martin Lee and other liberal politicians came in the wake of P.R.C.-appointed transitional bodies' and P.R.C. state organs' formal endorsements of illiberal changes to Hong Kong's rights laws.<sup>407</sup> More broadly, the British position was that any significant rolling back of the Bill of Rights or other key rights legislation would cast doubt on the P.R.C.'s legal and political commitments to Hong Kong and thereby "put[] at risk the confidence on which Hong Kong's prosperity is based."<sup>408</sup> Focusing specifically on one incident, Governor Patten called the Preparatory Committee's recommendations to overturn late colonial reforms of rights laws "very disturbing," another instance of "legal arguments hastily thrown together, policies made up as we go along,"<sup>409</sup> and a move that threatened to create a "terrible legal muddle."<sup>410</sup> Such legal sloppiness and uncertainty could hardly be welcomed by a business community that depended on a transparent and predictable legal order. After local business leaders attacked Patten for criticizing their lack of support for the

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<sup>405</sup> Graham Hutchings, *"Tango Dancer" Patten Stamps on China's Toes*, DAILY TELEGRAPH, Feb. 8, 1996, at 10.

<sup>406</sup> Belinda Goldsmith, *Hong Kong Party Leader Warns of Confidence Fall*, Reuters, Feb. 13, 1997, available in LEXIS, Asiapc Library, Allasi File.

<sup>407</sup> See *supra* Section 2.2.1; *infra* notes 412-14 and accompanying text.

<sup>408</sup> Chris Yeung, *UK Pledges Help for More than 50 Years*, S. CHINA MORNING POST, Mar. 21, 1997, at 6.

<sup>409</sup> Keith B. Richburg, *Chinese Approve Cutbacks in Hong Kong Civil Liberties*, INT'L HERALD TRIB., Feb. 3, 1997, at 4.

<sup>410</sup> Quak Hiang Whai, *Hong Kong: Tung Defends Plans by Beijing To Amend HK Laws*, BUS. TIMES (Singapore), Jan. 24, 1997, at 6.

endangered rights laws, British Prime Minister John Major backed Patten's efforts to some extent. With modest success, the Prime Minister pressured leading business groups in the territory to voice public support for human rights and the rule of law.<sup>411</sup> Major warned that if the business community failed to do as he urged and thus acquiesced in the undermining of the rule of law, the outcome would not be in the best interest of Hong Kong and its business community.<sup>412</sup>

British and Hong Kong defenders of the Bill of Rights and related law reforms also sought to enlist the support of the territory's international business community, where liberal-democratic notions of legality were thought to have a strong hold. Speaking to a forum in Singapore (a principal alternative site for businesses wary of Hong Kong's legal future), British Foreign Secretary Rifkind publicly condemned actions to repeal portions of the Bill of Rights.<sup>413</sup> Martin Lee, on a European tour, urged Western investors to be alert to threats to freedom of the press and other encroachments upon civil rights that could plague post-1997 Hong Kong.<sup>414</sup> He called on foreign business executives to "ask their presidents, prime ministers and chancellors to insist that China keeps its promises and maintains a free Hong Kong."<sup>415</sup> Those heads of government, Lee presumably hoped, would request or require business elites from their countries with interests in Hong Kong and China to behave in a manner compatible with the preservation of Hong Kongers' rights.

In addressing the Hong Kong business community's international segment, colonial officials and liberal politicians again emphasized the impact that a rollback of rights laws could have on the immediate interests of the business sector. Martin Lee warned that a lack of pressure on the P.R.C. to fulfil its pledge to preserve Hong Kong's rights-protecting legal order could hurt foreign businesses directly. As evidence, Lee noted that China's

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<sup>411</sup> See Louis Won, *Business Leaders Take Up Major's Call*, S. CHINA MORNING POST, May 25, 1996, at 6.

<sup>412</sup> See *id.*

<sup>413</sup> See Greg Torode & Duncan Hughes, *Qian Sticks to his Guns in Final Meeting with Rifkind*, S. CHINA MORNING POST, Feb. 15, 1997, at 1.

<sup>414</sup> See *Tung Chee-Hwa's Remarks Are Beneficial to Hong Kong's Prosperity*, *supra* note 238, at A4.

<sup>415</sup> C.K. Lau, *Why Martin Won't Keep His Mouth Shut*, S. CHINA MORNING POST, Feb. 16, 1997, at 11.

lack of regard for "individual freedoms" had already led to the kidnapping of foreign passport-holding, Hong Kong-based executives.<sup>416</sup> More generally, Hong Kong Financial Secretary Donald Tsang, who retained his post after the reversion despite having confronted Tung Chee-hwa over Tung's pro-China stance on rights issues, warned that international investors would pull out of Hong Kong if China failed to provide a more convincing case for the need to repeal or modify civil liberties legislation.<sup>417</sup>

Finally, the arguments that Hong Kong government officials and the territory's leading liberal politicians made concerning popular attitudes toward the Bill of Rights Ordinance and civil liberties carried a strong message for the business community. When British and colonial officials, Legco democrats and liberal commentators asserted that the people were so attached to their rights that a substantial roll-back would trigger deep disaffection or considerable disorder, they were also warning, and seeking to convince, the Hong Kong business community that moves to revise portions of the Bill of Rights, the Societies and Public Order Ordinances, and other laws would endanger crucial preconditions for Hong Kong business' continued success. The point appeared to register with some of the most politically involved leaders in the business community. Business-linked members of Legco and Exco had supported the initial enactment of the Bill of Rights Ordinance, and few of them were willing to abandon it completely in later years. Businessman-politician, Legco member, and leader of the pro-business Liberal Party, Allen Lee stated in 1995, "Beijing will have to back off" from its proposals to strip the Bill of Rights once Chinese authorities are made to "understand how the common people here have accepted the Bill of Rights. There is a perception that it protects them from government abuses."<sup>418</sup> Lee maintained this view despite China's increasingly clear and inflexible determination to overturn parts of the civil and political liberties-expanding legislation of the 1990s, including the controversial amendments to the Societies and

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<sup>416</sup> See Hong Kong, *The Future According to Martin Lee*, EUROMONEY, Sept. 1996, at 82, 82.

<sup>417</sup> See Amy Chew, *HK's Tsang Blasts "Meddling" by China*, BUS. TIMES (Malaysia), Jan. 29, 1997, at 82; see also Indira A.R. Lakshmanan, *Hong Kong Leader Backs Rights Plan*, BOSTON GLOBE, Jan. 24, 1997, at A2.

<sup>418</sup> Gilley, *supra* note 56, at 36.

Public Order Ordinances.<sup>419</sup>

Although some in the territory's indigenous and international business circles worried that a hard line from Beijing on civil and political rights in Hong Kong could be very bad for the local economy, and mainstream Hong Kong business leaders sometimes endorsed parts of the colonial government's rights agenda, attempts to cultivate such sentiments faced an inhospitable reception from a business community increasingly looking past July 1, 1997.<sup>420</sup> When Chief Executive-designate Tung Chee-hwa initiated his presumably Beijing-endorsed support for legislative reversals in the name of prosperity, stability, and suitability to Hong Kong's character and circumstances, the liberal-democratic task became even more daunting. At least on the surface, Hong Kong's business community had not been persuaded that it needed, or that it would be worthwhile to support, the preservation of a legal rights regime that adherents to a liberal-democratic perspective claimed was essential both to a just legal order for Hong Kong, and to a rule of law that would be adequate for Hong Kong's business community.

3.2.2. *Legco and Democratization: Of Interests and Obligations*

Claiming and cultivating business support for democracy-extending constitutional change was arguably an even more complicated and difficult project. This was particularly evident for the more radically reformist proposals backed by some of the territory's pro-democracy politicians, but it was also true for the more limited Patten proposals. For the Governor, his subordinates, and his sometimes reluctant allies among Legco's democrats, the basic strategy was to link the programs that introduced just and necessary changes in the institutions of representative government with the preservation or augmentation of prosperity and other ends that Hong Kong's business community could be assumed to value. Shortly after presenting the outline of his plan,

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<sup>419</sup> See Richburg, *supra* note 409, at 4 (quoting Allen Lee who stated, "I could not find anything that contradicts the Basic Law" in the legislation the Preparatory Committee recommended overturning).

<sup>420</sup> See, e.g., Paul Majendie, *Investors Say HK Good Bet — China Wants It To Succeed*, Reuters, Jan. 30, 1997, available in LEXIS, Asiapc Library, Allasi File ("There are very good reasons for believing the Chinese will do nothing to upset the apple cart."); see also Won, *supra* note 413, at 6.

Patten argued that "greater democracy helps to make communities more prosperous."<sup>421</sup> Although favoring more extensive democratic change than the Governor proposed, Martin Lee made the same general point, noting that "virtually every economically advanced nation . . . has recognised [sic] that prosperity and democracy are not mutually antagonistic but are, in truth, inseparable."<sup>422</sup>

Addressing her audience's concerns in more detail, Hong Kong Chief Secretary Anson Chan assured business leaders that Patten's electoral reforms would "in no way weaken [the Hong Kong government's] commitment to maintaining Hong Kong's attraction as the outstanding business location in this region. Indeed, by strengthening our representative institutions, they can only enhance investors' confidence . . . ."<sup>423</sup> Chan also asserted that the governor's proposals would not produce a Legco that would change the Hong Kong government's traditional emphases on low taxes, limited government spending, and the territory's economic well-being.<sup>424</sup> The Governor offered further reassurance and promised to build a bridge between business and the democratic politicians whose views worried business. Patten declared that he did not see "any reason why a successful businessman should be terrified of democratically elected politicians . . . ."<sup>425</sup> Noting that those politicians "have got to understand the business agenda," Patten added that Hong Kong's business community could rest assured that an empowered Hong Kong electorate, "a community which represents better than any other the triumph of market economy," would not "vote in large numbers for politicians who work in the opposite direction."<sup>426</sup>

Martin Lee made similar arguments in support of democratization generally and the Legco democrats' proposals for democratic reforms more sweeping than Patten's plan. Lee explained that he

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<sup>421</sup> Frank Ching, *Cleared for Action*, FAR E. ECON. REV., Oct. 22, 1992, at 20.

<sup>422</sup> Martin Lee, *Tide of Democracy*, FAR E. ECON. REV., Nov. 26, 1992, at 31.

<sup>423</sup> *Chan Says Companies Should Not Fear Legco Bill*, S. CHINA MORNING POST, Mar. 11, 1994, at 2.

<sup>424</sup> See *id.*

<sup>425</sup> Connie Law, *Governor Bids To Bridge Gap*, S. CHINA MORNING POST, July 4, 1994, at 3.

<sup>426</sup> *Id.*



and the Democratic Party had made democratic and accountable government their top priority precisely because it undergirded the rule of law, which was "vital to Hong Kong not only because it protects individual rights, but because it safeguards Hong Kong's free-market system by guaranteeing the protection of contracts and property necessary to continue our economic success."<sup>427</sup> Lee further argued that the free flow of information that business required was dependent upon the existence of democratically accountable institutions to make and oversee the enforcement of appropriate laws.<sup>428</sup>

Pro-democracy politicians and colonial officials cautioned that, if the business community stood in the way of democratic changes, it would be hurting itself, as well as Hong Kong more generally. If Hong Kong did not have "fair" and "credible" elections, Patten warned, it would be impossible to "maintain the rule of law," fight corruption, and maintain Hong Kong's prosperity.<sup>429</sup> Martin Lee echoed these concerns, arguing that "without democratic and accountable government, we will never be able to maintain the rule of law, and without the rule of law, Hongkong [sic] will experience a surge in [P.R.C.-style] corruption and *guanxi* [, reliance on personal connections, which] . . . would threaten the free competition that is the very foundation of our business success."<sup>430</sup> Opposition to moderate electoral reforms, Patten asserted, could harm business interests by fostering social unrest. "[T]he business community," he said, "needed to consider" whether it was "more destabilizing to try to accommodate, in a modest way, people's political and democratic aspirations or to block them off."<sup>431</sup>

After China made clear its inalterable rejection of the Patten reforms, and thus increased pressure on the territory's business

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<sup>427</sup> Lee, *supra* note 32, at 11.

<sup>428</sup> See *For Many Corporate Chiefs, 1997 Cannot Come Soon Enough*, *supra* note 403, at 23; see also Martin Lee, *supra* note 396, at 27 (arguing that a democratic system of government is necessary to assure that the rule of law will survive and therefore that business will still be conducted "freely," "fairly," and not through "under the table arrangements").

<sup>429</sup> Patten made these remarks in his 1993 state-of-the-territory address. See Frank Ching, *Confrontation in Hongkong*, FAR E. ECON. REV., Oct. 21, 1993, at 33; *Comment on Chris Patten's 'Theory of the Infiltration of Corruption'*, *supra* note 284, at 2.

<sup>430</sup> Lee, *supra* note 422, at 31.

<sup>431</sup> *Interview with Chris Patten*, FAR E. ECON. REV., Oct. 22, 1992, at 22.

elites not to support the Governor's plan, proponents of democratic reforms continued to assert that the reforms would serve the business community's material interests. The tone grew more grim, however, and the arguments played more heavily on the business community's fears, especially by linking the rejection of democratic reform to the prospect of social unrest and instability. Patten warned that "billionaires whose principal concern is that they should go on being billionaires" risked, in their role as China's principal advisers on Hong Kong, exacerbating Chinese officials' dangerous "lack of understanding about what makes Hong Kong tick."<sup>432</sup> In the same spirit, pro-democracy independent legislator Emily Lau commented after the 1995 Legco elections, "I wish those tycoons whom Beijing likes to talk to so much . . . would speak out for what Hong Kong really wants."<sup>433</sup> The tycoons' failure to do so was "bad for business and bad for prosperity" as well as bad for the people of Hong Kong.<sup>434</sup> On this view, if the territory's business elites insisted on telling the central authorities in Beijing that neither they nor the Hong Kong people needed or wanted democratic reform, the Chinese leadership might well believe them and deny Hong Kong the kind of electoral laws and constitutional order that Hong Kongers ardently demanded and that Hong Kong business ultimately needed.

The colonial administration and Hong Kong's leading pro-democracy politicians continued this line of argument in addressing China's plan to replace the Legco elected under the Patten reforms with an appointed Provisional Legislature. For business to treat the derailment of the "through train" for Legco as a minor, containable incident would be folly, Patten argued, because "once you start to unpick the rule of law and all the things that are associated with it, you start to find that the jumper is turning rapidly into a ball of wool."<sup>435</sup> Patten later commented that

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<sup>432</sup> Hutchings, *supra* note 405, at 10.

<sup>433</sup> Andrew Higgins, *The Vanishing Trick*, GUARDIAN (London), Sept. 19, 1995, at 17.

<sup>434</sup> *Id.*

<sup>435</sup> *The China Prism*, *supra* note 115, at 16 (interviewing Governor Patten); see also *Fair Polls Seen as "Vital for the Future,"* S. CHINA MORNING POST, June 30, 1994, at 6 (quoting Hong Kong Chief Secretary Anson Chan saying that electoral arrangements "which are less than open and fair, strike at the very roots of the rule of law on which the whole fabric of this . . . successful

bowing to business pressures to compromise with China on political reform, and to accept a less democratic Legco that China might allow to survive the transition, would have been a recipe for "pretty good chaos," something Hong Kong's business community surely would not have welcomed.<sup>436</sup> Pro-democracy Legco members warned Hong Kong business leaders that China's plan to replace the existing Legco with the interim body would undermine the territory's "business environment" and the rule of law, which was "the bedrock of Hong Kong's success."<sup>437</sup>

Hong Kong government sources also addressed the impact of the prospective establishment of the Provisional Legislature on Hong Kong's vital links to the global economy, seeking to tap the business community's fear of massive capital flight and to claim support in the territory's international business circles. Patten cautioned that China's lawless selection of a docile body could give Hong Kong "the reputation that the rule of law was under threat," which would prompt "the international business community [to] move its cash elsewhere . . . ."<sup>438</sup> Chief Secretary Anson Chan offered a similar, if more mild, warning when she noted, "[a]s regards our legislature, there are clear concerns and much will depend on China's action[s]" during the final year before reversion, and "[i]t goes without saying that a legitimate and truly representative legislature will do much to give confidence to . . . international investors."<sup>439</sup>

A final strand in the colonial authorities' and pro-democracy politicians' strategy to persuade the business community argued that business leaders who undermined democratic reform were betraying Hong Kong and democratic principles that were morally obligatory and that were dear to Hong Kongers. In this vein, Patten argued that Hong Kong's tycoons had a "social responsibility" to stand up for Hong Kong, and urged business to

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community depends").

<sup>436</sup> Bruce Gilley, *Standing Pat*, FAR E. ECON. REV., May 30, 1996, at 16.

<sup>437</sup> Angela Li & Vivian Lee, *Business Lobby Under Fire for Patten Letter*, S. CHINA MORNING POST, May 23, 1996, at 6.

<sup>438</sup> Maggie Farley, *Ditching the Colonial Past*, SUNDAY TIMES (London), Feb. 6, 1994 (quoting Patten's statement to the House of Commons Foreign Affairs Committee). Patten added that "it would not take very long" for the international business community to move its assets. *Id.*

<sup>439</sup> 'Business as Usual' Post-1997, S. CHINA MORNING POST, July 1, 1996, at 1.

"understand it would not be in Hong Kong's interest to sell out the Joint Declaration [including its provision promising democratic government] as a way of securing a quiet life."<sup>440</sup> Patten denounced the business leaders who, as members of the Preparatory Committee, supported the establishment of the Provisional Legislature for "sign[ing] up to arrangements whose sole intention is to choke off the voice of those who represent the majority of public opinion."<sup>441</sup> Similarly, Martin Lee charged that for a businessman to oppose Patten's reforms was "to display an appalling lack of faith in the people of Hongkong [sic] who have made their success possible."<sup>442</sup> Such arguments sometimes implied the familiar threat that reversing democratization would trigger popular discontent and disaffection that would bring material harm to business, but their principal and immediate focus was a set of normative principles that were central to the liberal-democratic vision of a rule of law for Hong Kong, and that proponents of reform thought business should be ashamed to betray.

Whether focusing on the business community's assertedly underperceived material stake in a democratically grounded rule of law, or appealing to the business community's sense that it might owe something to Hong Kongers who had made business elites rich, the varied arguments from the proponents of democratic reform sought primarily to persuade a business community whose established preferences could not be counted upon to produce support for Patten's or the Legco democrats' agenda. Working from a concededly weak base, efforts to enlist or elicit business support for democratic reforms of any sort drew decreasingly enthusiastic responses during the final years preceding Hong Kong's reversion. The Tiananmen Incident and the public reaction to it in Hong Kong had produced business support for electoral reform.<sup>443</sup> Partly to forestall more sweeping reforms

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<sup>440</sup> Gilley, *supra* note 436, at 16; see also Simon Holberton, *Hong Kong Reforms Upset Business Community*, FIN. TIMES, July 2, 1994 (quoting Patten's statement that "[w]e have got . . . to get business to understand it would not be in Hong Kong's interest to sell out the Joint Declaration").

<sup>441</sup> Mary Kwang, *Rift Between Patten, Businessmen Likely To Continue Till HK Handover*, STRAITS TIMES (Singapore), May 29, 1996, at 28.

<sup>442</sup> Lee, *supra* note 422, at 31.

<sup>443</sup> See, e.g., Emily Lau, *Out of Apathy*, FAR E. ECON. REV., June 1, 1989 at 18 (discussing the political awakening of Hong Kong through demonstration

of the sort that Patten and democratic politicians later advocated, leading business figures, pro-business organizations, and business-based or business-supporting members of Exco and Legco endorsed plans to make a substantial portion of Legco's seats directly elected.<sup>444</sup> In addition, business interests organized political parties to contest the elections held under the Patten and pre-Patten reforms, running on platforms that embraced the principle of democratic elections.<sup>445</sup> One leading businessman-politician commented after Patten had tabled his reform package but before the 1995 Legco balloting yielded a landslide for democrats, that Patten "quite rightly [felt] a mandate should come from some form of representation" and that members of the business community "should run for elections" if they "want to make [their] views known."<sup>446</sup> Expatriate executives from some of Hong Kong's most venerable business institutions were more openly enthusiastic, and in some cases, they fully endorsed Patten's proposals.<sup>447</sup> One businessman-politician from their

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responding to the mainland democracy movement and its suppression); Lau, *supra* note 16, at 18 (discussing legislators' and business leaders' reactions to the pro-democracy student protests in Hong Kong).

<sup>444</sup> See, e.g., Emily Lau, *Red Herring*, FAR E. ECON. REV., Sept. 14, 1989, at 26 (describing conservative and business support for making a substantial portion of Legco's seats directly elected by 1997).

<sup>445</sup> See *id.*; see also, e.g., do Rosario, *supra* note 91, at 20 (describing the support of the Conservative Resource Center, a pro-business quasi-party, and, later, the Liberal Party, the territory's principal pro-business political party, for modest expansion of the franchise); Emily Lau, *Peking's Tune*, FAR E. ECON. REV., Aug. 23, 1990, at 22 (describing the formation of pro-business political groups); Bellette Lee, *Political Flag for Business*, S. CHINA MORNING POST, Oct. 23, 1990 (discussing the platform of the Liberal Democratic Federation of Hong Kong); Theresa Poole, *Patten Faces Pro-China Alliance*, INDEPENDENT (London), Jan. 20, 1993, at 11 (discussing business attitudes opposing Patten's reforms as "confrontational" towards China).

<sup>446</sup> James Tien, *HK Can Survive Under One Country, One System*, S. CHINA MORNING POST, May 2, 1993, at 11 (expressing the views of General Chamber of Commerce General Committee member and former Legco member James Tien); see also Emily Lau, *Political Shell Game*, FAR E. ECON. REV., April 5, 1990, at 25 (reporting a statement by leading Hong Kong tycoon Li Ka-shing that businessmen must take part in politics).

<sup>447</sup> See Huang Chen-ya, *Jardines Salvo is HK Wake-Up Call*, S. CHINA MORNING POST, Dec. 20, 1992; see also Catherine Ong, *No Slowing Down for this Tough 'Last Taipan'*, BUS. TIMES, July 1, 1994, at 17 (quoting out-going Hutchison Whampoa chief Simon Murray as sharing Patten's belief that democratic reform is necessary to preserve Hong Kong's rule of law, and thus the difference between Hong Kong and Guangdong); Doreen Cheung, *Purves Calls for Open and Fair Polls*, S. CHINA MORNING POST, Oct. 5, 1993, at 2

ranks declared that "the mainspring of our prosperity and stability remains rooted in the rule of law . . . and a legislature safeguarded by its accountability to the population."<sup>448</sup>

Patten and Legco democrats were not able to make much use of this early acquiescence and fragmentary support from the business community in their protracted battle to enact electoral and constitutional reform and to preserve a relatively democratically elected Legco's hope to become the first S.A.R. legislature. Visible backing from business soon waned because of a variety of factors. China was willing to stall progress on lucrative and essential long-term infrastructure projects in the territory,<sup>449</sup> and to cast doubt on the fate of government contracts extending through and beyond 1997,<sup>450</sup> in order to press for the results it wanted in the row over political reform. These moves raised considerably the perceived costs to business of supporting Patten's proposals for democratic change. China's rhetorical and financial assault on Jardine Matheson, one of the most prominent corporate supporters of the reforms, underscored the fact that China could impose more direct and individualized costs on business that dared to back Patten's program.<sup>451</sup> Caught between China's intractable opposition to reforms and local pressure to back democratization, many in the business community, including some who accepted democracy in principle, came to believe that the British colonial authorities had put them in a difficult position by a sudden and belated concern with democracy that smacked of

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(quoting Hong Kong and Shanghai Bank chief Sir William Purves).

<sup>448</sup> *Bitter Battle for the Business Seat*, *supra* note 387 (quoting Jimmy McGregor).

<sup>449</sup> See Emily Lau, *Terminal Delay*, FAR E. ECON. REV., Mar. 21, 1991, at 11; Stacy Mosher, *Creeping Intervention*, FAR E. ECON. REV., July 18, 1991, at 10.

<sup>450</sup> See *China Accused of Threatening Rule of Law*, Reuters, Dec. 23, 1992, available in LEXIS, Allasi Library, Asiapc File; Liu Shih-hsin, *Lu Ping Talks with Visiting Textile Delegation from Hong Kong*, WEN WEI PO, Dec. 1, 1992, at 2 (explaining that contracts extending beyond 1997 must be "discussed" with the P.R.C. or else parties will lack "legal protection"); Tai Ming Cheung, *Push Came to Shove*, FAR E. ECON. REV., Dec. 10, 1992, at 8.

<sup>451</sup> See Chen Chien-ping, *Quoting Out of Context and Misleading the Public*, WEN WEI PO, Dec. 7, 1992, at 2; Chen Chien-ping, *China and Britain Should Still Cooperate on Other Issues*, WEN WEI PO, May 14, 1994, at A3; Tai Ming Cheung, *Silent Night*, FAR E. ECON. REV., Jan. 7, 1993, at 9.

hypocrisy.<sup>452</sup> The resulting resentment did not help reform proponents' cause among Hong Kong business elites.

Several additional developments diminished the influence of pro-political reform voices within the business community. These changes included a continuing indigenization of the executive ranks of leading Hong Kong companies, a growing circumspection among some expatriate business leaders about foreigners' participation in the process of constitutional development for a post-colonial Hong Kong, the striking success of pro-China "united front" tactics in capturing the principal organs formally representing business interests in Hong Kong's corporatist politics, and the creeping impact of P.R.C. entities' buying major stakes in prominent Hong Kong companies.<sup>453</sup> Moreover, the electoral triumphs of Hong Kong's democratic parties and pro-democracy independents increased business' fears that advancing political reform meant inviting unchecked social spending and other policies that would be costly and unpalatable to business interests.<sup>454</sup>

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<sup>452</sup> See, e.g., Nigel Page, *Hong Kong's Alternative Voice*, INT'L FIN. L. REV., May 1994, at 48 (quoting banker and Legco member David Li describing his views as typical of the financial community).

<sup>453</sup> See *Bitter Battle for the Business Seat*, *supra* note 387; Timothy Charlton, *Legco Reforms Create Problems, Says Fung*, S. CHINA MORNING POST, July 4, 1994, at 1; do Rosario, *supra* note 91, at 22 (quoting Jardines' director and Legco member explaining that his abstention in the Legco vote on democratic reform is appropriate because "the scales should be tipped by people whose home has been and will be Hong Kong for generations to come"); Fung Wai-kong & Linda Choy, *Chamber Spurns McGregor in Poll for Committee*, S. CHINA MORNING POST, Apr. 27, 1994, at 1; Simon Holberton, *China Tries To Win Control of HK Chamber*, FIN. TIMES, Apr. 2, 1993, at 3; Mary Kwang, *Pro-China Lobby Out of the Backseat*, STRAITS TIMES (Singapore), May 9, 1993, at 14; Catherine Ong, *No Slowing Down for this Tough "Last Taipan"*, BUS. TIMES, July 1, 1994, at 17 (describing Simon Murray's departure from Li Kashing's Hutchinson Whampoa); Chris Yeung & Connie Law, *China Hits Patten for Deal with Jardines*, S. CHINA MORNING POST, Sept. 14, 1994, at 1 (describing a Jardines Matheson officer and Legco member's abstention that led to the defeat of the pro-business Liberal Party's more modestly democratizing alternative to Patten reforms).

<sup>454</sup> See do Rosario, *supra* note 91, at 20 (noting business representatives' worry that, if elected, pro-democracy politicians would press for expensive government spending packages); do Rosario, *supra* note 301, at 28 (noting criticisms of Democrats for raising populist expectations of tax cuts and welfare spending); *Increasing Tax in Disguised Form, and Shifting Misfortune to the Special Administrative Region*, WEN WEI PO, Dec. 17, 1993, at 2; Jonathan Karp, *Man in the Middle*, FAR E. ECON. REV., Oct. 13, 1994, at 16 (noting Deputy Director of Hong Kong and Macao Affairs Office Wang Fengchao's cautions

Faced with such strong indications of a lack of support in the business community, Hong Kong government officials and pro-democracy politicians sometimes asserted that appearances were misleading, and that their programs for democratic reforms in fact enjoyed the backing of the business community. They argued that the seeming lack of support from the business community was disingenuous, and that the business community's silence or apparent opposition was the product of Chinese threats of economic retaliation.<sup>455</sup> More often, they acknowledged that business' apparent attitudes were perhaps genuine, but benighted and dangerous. Thus, one prominent pro-democracy politician lamented that business leaders had taken the short-sighted and mistaken view that "so long as they can establish good connections with Chinese officials, their profits are guaranteed."<sup>456</sup> Similarly, Governor Patten regretted that "some people in the business community who should know better . . . underestimate the importance of the rule of law"<sup>457</sup> and a credible legislature to Hong Kong's prosperity.

On either of these relatively pessimistic accounts of the business community's subjective views, the advocates of democratic reform faced a difficult task of persuading business elites to change their positions. They had to make business recognize, or act on its recognition, that "[w]hat business needs above all, in the long term, is the certainty of the rule of law — of laws democratically enacted and rooted in the community."<sup>458</sup> From the liberal-democratic perspective that colonial officials and pro-democracy politicians in Hong Kong shared, these elements that business needed were also features that a just and adequate rule of law for Hong Kong entailed. Although their comments about business attitudes and actions sometimes sounded resigned or

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about the burden that excessive welfarism would cause); Jonathan Karp, *Money Talks*, FAR E. ECON. REV., Mar. 17, 1994, at 18 [hereinafter Karp, *Money Talks*] (quoting a Bank of China economist warning about "generous social spending"); William McGurn, *Diminishing Returns*, FAR E. ECON. REV., June 13, 1996, at 63 (noting that Joint Liaison Group Chinese team leader Chen Zuo'er likened the "increases in spending to a . . . racing car spun out of control"); Yeung & Wong, *supra* note 326, at 21.

<sup>455</sup> See *For Many Corporate Chiefs, 1997 Cannot Come Soon Enough*, *supra* note 403, at 22 (quoting Martin Lee); Lee, *supra* note 49.

<sup>456</sup> Lee, *supra* note 396.

<sup>457</sup> Greenway, *supra* note 397, at 24.

<sup>458</sup> *Interview with Chris Patten*, FAR E. ECON. REV., *supra* note 433, at 22.



desperate, the proponents of democratic reform consistently tried to convince, scare, and bargain with business elites to get them to do what was both right and self-interested. Thus, for example, Patten followed up his vitriolic attack on business leaders, for betraying Hong Kong's democracy with their endorsement of the Provisional Legislature, with an offer to retract his remarks if Hong Kong's businessmen spoke up for democracy and human rights in Hong Kong.<sup>459</sup>

### 3.2.3. *The Court of Final Appeal and the Requisites of Confidence*

The controversy over the Sino-British accords on the Court of Final Appeal, and legislation to implement them triggered a public split among adherents to a generally "liberal" or "pro-democracy" perspective on the rule of law for Hong Kong. The schism over the Court was deeper than the disagreements within the pro-reform camp that marked the debates concerning business attitudes toward the Patten reforms and Legco democrats' more sweepingly democratic alternatives. On the Court issue, colonial officials and prominent politicians engaged in a sometimes bitter struggle over the business community's stance on a proposed Court arrangement that Hong Kong government officials claimed was sufficient to secure an adequate rule of law for the territory, and that liberals in Legco and elsewhere denounced as a betrayal of Hong Kong's rule of law.

Beginning in 1991 and again in 1995, Hong Kong government officials faced a delicate and difficult task. They had to sell Hong Kong's business community on controversial C.F.A. arrangements while defending those arrangements against serious doubts about their compatibility with rule-of-law values that the colonial authorities claimed to support and that business might consider important. The principal strategy was to capitalize on the Hong Kong business community's considerable satisfaction with the existing legal and judicial systems. Thus, Hong Kong government proponents of the Court accords argued that the C.F.A. bills would adequately preserve the established system of independent courts and a common-law order protecting and advancing business interests in a post-1997 system, as promised in the Joint Declara-

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<sup>459</sup> See Mary Kwang, *Rift Between Patten, Businessmen Likely to Continue Till HK Handover*, STRAITS TIMES (Singapore), May 29, 1996, at 28.

tion and the Basic Law.<sup>460</sup> In a broad formulation of this line of argument, Chief Secretary Anson Chan characterized the 1995 bill as one that "ensures continuity of the rule of law in Hong Kong through the transition and will safeguard public and international confidence in Hong Kong," which was routinely acknowledged to be vital to Hong Kong's prosperity.<sup>461</sup>

During the attempts to pass the second bill, government officials added a less positive argument. Proponents of the 1995 legislation emphasized that the arrangements adopted in the second Court deal at least had induced China to drop plans to create a new quasi-judicial body, directly controlled by the P.R.C., to review C.F.A. decisions on a variety of potentially politically sensitive issues.<sup>462</sup> Proponents of the second accord assumed that this aspect of the deal would appeal to a business community that was thought to view P.R.C.-style legality as vastly inferior to Hong Kong's existing system, and that thus would welcome a promise not to establish an entity potentially so corrosive of Hong Kong's judicial autonomy.<sup>463</sup>

In addition to arguments focusing on the asserted substantive merits of the proposed arrangement, proponents of the Court deals consistently stressed the structural importance to business of having some resolution in place before reversion. Colonial government officials sought to elicit business support by addressing the business community's aversion to legal and institutional uncertainty. They argued that the 1991 deal offered the prospect of settling the matter of the Court's form and powers early, and

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<sup>460</sup> See generally Ching, *supra* note 37, at 173, 189-91 (discussing the politics of the 1991 Sino-British accord on the C.F.A. and its reception in Hong Kong).

<sup>461</sup> Yeung et al., *supra* note 138, at 1; see also Mathews *Strikes at Opposition*, S. CHINA MORNING POST, June 15, 1995, at 6 (noting similar comments from the Attorney General).

<sup>462</sup> See, e.g., *Hong Kong Court*, FIN. TIMES, June 12, 1995, at 19 (arguing that the P.R.C. dropped plans to establish a review tribunal that would override C.F.A. decisions because the P.R.C. feared that the proposal threatened business confidence).

<sup>463</sup> At the very least, no one had laid the political groundwork to make a post-verdict review mechanism seem acceptable (or at least inevitable to Hong Kong's business community). Although it was broadly similar in according P.R.C. institutions a role in the interpretation of Hong Kong law, such a proposal stood in considerable contrast to the rather carefully crafted and long-standing provisions in the Basic Law concerning the power of the N.P.C., its Standing Committee, and the Central People's Government to amend, interpret, and implement the Basic Law.

would permit the establishment of the Court well before July 1, 1997. This would give the Court time to gain experience, establish a record, and develop precedents in advance of reversion — all virtues that business could appreciate.<sup>464</sup> In May 1995, on the eve of the second Sino-British deal concerning the Court, Attorney General Mathews was still urging support for an arrangement that he expected would permit the establishment of a Court by mid-1996 to avoid a “judicial vacuum” that would “seriously undermine[]” economically vital “international confidence in Hong Kong’s legal system.”<sup>465</sup> Uncertainty about the Court was, Mathews argued, “already having a damaging effect on confidence in Hong Kong,” prompting businesses to draw up commercial contracts “with clauses aimed at avoiding resort to Hong Kong courts.”<sup>466</sup> It was “clearly harmful to Hong Kong’s reputation as a commercial and financial services center” that “investors [were] showing [such] a lack of confidence in [Hong Kong’s] judicial system.”<sup>467</sup> Even at this late date, Mathews argued, legislation implementing the 1991 deal and setting up the court “as soon as possible” was imperative, for it would bring a pre-reversion end to the devastating “[u]ncertainty over when and on what basis [this] crucial symbol and embodiment of the rule of law”<sup>468</sup> would be established.

Hong Kong government officials could not invoke some of these advantages in their quest for business support for the 1995 deal, however. Their arguments had to rest on the perils that would befall business if the deal were rejected and a Court acceptable to China could not be established as of July 1, 1997. Proponents of the 1995 Court bill thus stressed the more modest certainty that the legislation would provide: the Court’s powers and composition, no worse than in the 1991 deal, would be clearly set forth and accepted many months before the reversion, and the business community therefore would not have to bear the risks or

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<sup>464</sup> See, e.g., Mosher, *supra* note 136, at 10 (indicating the British desire to establish a court in 1993 so that it would be operating smoothly prior to reversion); Mosher, *supra* note 179, at 13 (mentioning the considerable desirability to organize the court promptly to establish its international reputation).

<sup>465</sup> do Rosario, *supra* note 148, at 22.

<sup>466</sup> *Courting the Right Bill*, *supra* note 135, at 13.

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

endure the continued uncertainty that would attend having to rely on unilateral P.R.C. legislation or post-reversion S.A.R. legislation to establish the C.F.A. and define its powers. In a somewhat disingenuous characterization of the British authorities' preferred option, Governor Patten articulated this line of argument: "[T]he choice we have is either we don't have a court before 1997, or we set up a court [unilaterally] which is changed or thrown out in 1997, or we give [Legco] the opportunity of determining the nature of the court which will begin to operate on July 1, 1997" by approving the C.F.A. bill.<sup>469</sup> Stating the government's argument for the 1995 bill, Anson Chan maintained that the proposed legislation made "absolutely certain" that there would be a "proper" court in place at reversion, and would immediately end the "uncertainty about the establishment of the C.F.A." that had gone on "for too long" and had had "a damaging effect on confidence."<sup>470</sup>

Pro-democracy legislators and prominent liberal voices in Hong Kong rejected the government's arguments that a C.F.A. set up in accordance with either of the Sino-British accords would be a "proper" Court, as judged by a broadly liberal-democratic notion of the rule of law, or an adequate Court, as measured against the needs and wants of Hong Kong's business community. Backed by the Hong Kong Bar Association, which represented the territory's barristers, and, initially, by the Hong Kong Law Society, which represented the colony's solicitors, Legco liberals and democrats worked to discern and develop opposition to the C.F.A. bills in the business community. They argued that the planned arrangements for the C.F.A. eviscerated the court-dependent and common law-based rule of law upon which Hong Kong business depended, and that, by abandoning the Joint Declaration's and Basic Law's pledges of legal continuity, the Court deals also portended a broader unravelling of much that business valued.<sup>471</sup>

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<sup>469</sup> Yojana Sharma, *Britain Agrees To Deal with China on New Court for Hong Kong*, DAILY TELEGRAPH, June 9, 1995, at 12; see also Patten *Deal with China Aims To Save Doomed Legislature*, ASIAN POL. NEWS, July 17, 1995 (explaining the political stances taken on the 1995 deal). The British had made similar arguments that rejecting the 1991 accord would allow China to set up whatever C.F.A. it sought after 1997. See Ching, *supra* note 37, at 190.

<sup>470</sup> Yeung et al., *supra* note 138, at 1.

<sup>471</sup> See, e.g., Won & Wong, *supra* note 146, at 3 (quoting Legco member Emily Lau stating that the deal "undermine[s] the Joint Declaration"); Chris Yeung & No Kwai-yan, *Governor Survives Vote*, S. CHINA MORNING POST,

(Indeed, Legco Democrats and some pro-democracy independents considered the shortcomings of the 1995 bill to be so serious that they both voted against the bill and pressed, albeit unsuccessfully, for a symbolic Legco vote of no-confidence in the Patten government.)

More specifically, Martin Lee argued that the failure to establish an adequate, rule-of-law-protecting Court would produce a judicial system that Hong Kong's business community would surely find uncongenial. In Lee's dark scenario, disputes between Hong Kong and Chinese companies would be adjudicated by S.A.R. judges who would be "subject to constant pressure" by the Chinese government and the Communist Party and unable to make "an independent and fair judgment."<sup>472</sup> The Court deals' narrow restrictions on the number of foreign judges with international reputations and foreign passports suggested that such problems could extend to the judiciary's highest levels. Lee and others argued that the business community had equally good reason to fear, and to oppose, the provisions in the C.F.A. deals and implementing legislation that denied the Court jurisdiction over "acts of state" and failed to define clearly the scope of those acts of state. In the eyes of the Court accords' critics, these provisions raised the prospect that Hong Kong courts would not be open to Hong Kong companies and individuals seeking judicial relief from adverse actions by S.A.R. officials or breaches of contract by Chinese state-owned corporations.<sup>473</sup> Similarly, while China's decision to forego creating a new P.R.C. entity to review C.F.A. judgments was to be welcomed, Hong Kong liberals and democrats concluded that China's having contemplated establishing the body at all was an ominous signal to the business community and others that only a weak and docile Hong Kong Court might be acceptable to China.<sup>474</sup>

Like the arguments that sought to claim and to cultivate

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July 13, 1995, at 1 (quoting Democratic Party Legco member Cheung Man-kwong stating that the C.F.A. deal signalled the "downfall of the rule of law in Hong Kong").

<sup>472</sup> Lee, *supra* note 396; see also, *Hong Kong, The Future According to Martin Lee*, *supra* note 418, at 82, 82; Lee, *supra* note 32, at 11.

<sup>473</sup> See, e.g., Gilley, *supra* note 24, at 72, 74; *Hong Kong, The Future According to Martin Lee*, *supra* note 416, at 82, 82 (discussing Lee's fears and hopes for the territory's legal and judicial future).

<sup>474</sup> See do Rosario, *supra* note 148, at 22.

business support for the Bill of Rights and democratic reforms, Legco democrats' and liberals' arguments that the arrangements contemplated in the C.F.A. deals would fail to satisfy the business community's requirements attracted initial support from the business community that declined over time. The 1991 bill failed in Legco, in part because pro-business members voted against it, and some business leaders had publicly expressed concerns about the bill that paralleled Legco Democrats' arguments against the legislation.<sup>475</sup> By the time the Hong Kong government presented the 1995 deal, however, the balance appeared to have shifted. Some pro-business politicians and foreign officials who claimed to understand the views of the territory's international business community continued to argue against parts of the Court bill.<sup>476</sup> Most politically influential voices from the territory's business community, however, supported the legislation to implement the second Sino-British accord on the Court. British and colonial government arguments about the perils of a second rejection appeared to have swayed or silenced local and international business interests. Attorney General Mathews could confidently proclaim that the business community in Hong Kong and abroad gave the 1995 accord a warm welcome.<sup>477</sup> In the end, the

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<sup>475</sup> See, e.g., Mosher, *supra* note 136, at 10 (discussing Legco's rejection of the 1991 deal); Page, *supra* note 454, at 48 (quoting prominent banker, Basic Law Drafting Committee, and Legco member David Li, who stated that a failure to resolve the court issue threatened "[t]he judiciary's independence" which "is vital to Hong Kong's continued prosperity" but who appeared unwilling to endorse the 1991 accord); *A Rosy Future for Hong Kong's Legal System?*, LLOYD'S LIST, Dec. 11, 1992 (presenting similar views from members of the international business community); see also do Rosario, *supra* note 153, at 20 (describing Legco democrats' and pro-business members' combining to defeat the 1991 bill); Mary Kwang, *HK Govt Faces Tough Fight on Appeal Court Bill*, STRAITS TIMES (Singapore), June 10, 1995, at 17 (noting that the business community sided with liberal politicians' objections to a late starting date for the Court of Final Appeal).

<sup>476</sup> See, e.g., *China's Chill Wind*, FAR E. ECON. REV., May 18, 1995, at 5 (noting that the U.S. Consul General in Hong Kong thought that the restriction on the number of foreign judges and the possibility of a post-verdict remedial mechanism controlled by China would threaten a dilution of the rule of law that would "certainly drive away" foreign investors); Kwang, *supra* note 477, at 17; Won & Wong, *supra* note 146, at 3 (describing splits among Legco members from the generally pro-business Liberal Party over whether to support the 1995 bill, given the restrictions on foreign judges' serving and the late establishment date for the Court).

<sup>477</sup> See *Mathews Strikes at Opposition*, S. CHINA MORNING POST, June 15, 1995, at 6 (describing the relief of international and local business at the

legislation passed Legco, with most of the members from the pro-business Liberal Party voting for it, and without triggering an outcry from any major sentiment of the territory's business community.<sup>478</sup>

Even so, opponents of the C.F.A. accords still argued that apparent acquiescence did not represent the true views of business.<sup>479</sup> According to some of Hong Kong's leading liberal and pro-democracy politicians, the business community in fact recognized its need for a Court that exceeded what the Sino-British deals would provide, and a Court that more nearly approached Hong Kong liberals' and democrats' conception of the requisites of an adequate rule of law and a just legal order. They argued that, in the face of the combined pressure of the territory's present and future masters, business had only outwardly succumbed to calls to support the 1995 bill. There was, on this view, little reason to think that the level of business distress over the 1991 bill had rapidly dissipated and been replaced by genuine support for a 1995 bill that was, after all, identical to the 1991 bill in several respects, and less favorable than the earlier legislation on the crucial question of the Court's establishment date. The visible splits among pro-business legislators over the 1995 bill provided further support for this line of argument.

Liberal and democratic critics of the Court deals also pointed

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achievement of a Court deal, and the other deals it made possible); *Politics of a New Era*, EUROMONEY, Sept. 1995, at 449; Stephen Vines, *Beijing, London Sign Agreement on HK Court of Final Appeal*, BUS. TIMES, June 10, 1995, at 3.

<sup>478</sup> See Yeung et al., *supra* note 138, at 1, (describing the Legco alignment on the C.F.A. Bill); Won & Wong, *supra* note 146, at 3; Chris Yeung & Linda Choy, *Issue "Back to Square One,"* S. CHINA MORNING POST, May 4, 1995, at 1 (noting liberal Legco member and G.C.C. head Jimmy McGregor's switch from opposing the 1991 bill to supporting the 1995 bill).

Patten, while critical of business' stance on other issues, praised the territory's business community for being very helpful in securing a deal on the Court. See Hutchings, *supra* note 407, at 10; Chris Yeung & Genevieve Ku, *Patten Tells Businessmen To Stand Up for Autonomy*, S. CHINA MORNING POST, Oct. 11, 1996, at 1; see also *Rule of Law Uncertain*, S. CHINA MORNING POST, Nov. 2, 1994, at 20 (describing the prospect that the parties would fail to achieve and implement a C.F.A. agreement before reversion as risking the creation of a "legal vacuum" that "could seriously damage investment in the territory" — a prospect that should prompt "businessmen . . . [to] do their utmost to convince [P.R.C.] officials of the folly of undermining Hong Kong's judicial system, however temporarily").

<sup>479</sup> See, e.g., Yeung & No, *supra* note 150, at 1; Steinberger, *supra* note 377, at 8.

to less "political" and, perhaps, more reliable indicators suggesting that business held pessimistic views of the second Court deal and continued to demand, albeit not very visibly, a more robust rule of law. Thus, Martin Lee asked rhetorically, of the firms that had shifted their corporate domiciles to other countries for fear of Hong Kong's rule of law, "How many companies which left are coming back now that we have such a good Court of Final Appeal agreement?"<sup>480</sup> He could also have asked how many more of Hong Kong's local and foreign firms were ready and able to take flight if the Court deal proved to be as bad as he and like-minded politicians claimed and feared.

### 3.2.4. *The Chief Executive: From Process to Substance*

Like the debates over the C.F.A. bills, the controversy surrounding the selection of the S.A.R.'s first Chief Executive brought another visible split between Hong Kong's British colonial authorities and its most ardently pro-democracy politicians. While each group insisted that the Chief Executive selection process and its outcome had to be compatible with the broad notions of accountable government and the rule of law that they shared, they differed over what those principles required in this context. Accordingly, British and Hong Kong governments, on one side, and the Legco democrats and liberals, on the other side, made quite different arguments about what Hong Kong's business community should think about the Chief Executive question.

Pro-democracy critics of the selection process primarily sought to secure business support by arguing that the selection process and its outcome threatened the business community's immediate material interests. They argued that Beijing had so thoroughly orchestrated Tung Chee-hwa's undemocratic selection that it would be very difficult for him to protect the interests of Hong Kong business (or of anyone else in Hong Kong) in the face of pressure or neglect from Beijing. From this perspective, Tung's moral debt to the territory's new masters, for having bailed out his family's troubled shipping business, further weakened the Chief Executive-designate's ability to stand up for Hong Kong and its business community's needs. With critics of the process having

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<sup>480</sup> Steinberger, *supra* note 375.



accepted the inevitability of Tung's selection long before his formal nomination or appointment, Hong Kong liberals' and democrats' arguments to the business community did not seek to affect the outcome. They attempted instead to rally business to push Tung to defend Hong Kong's interests generally, including the preservation of Hong Kong's promised autonomy from prosperity-threatening interference from Beijing.

Hong Kong's colonial authorities had to craft a more complex strategy to pursue business support for the closed and preordained Chief Executive selection process and its outcome, without at the same time compromising the Hong Kong government's enhanced commitment to liberal-democratic norms in the struggles over rights legislation, democratic reform and the legal and institutional issues of the endgame more generally. Crafting an appropriate and effective approach to business was an especially difficult and delicate task for a colonial government that had pledged early on to cooperate with the Chief Executive-designate, and that arguably had an even shakier claim than Tung to a democratic or electoral mandate to rule Hong Kong. Within the constraints that these positions imposed, Hong Kong government officials sought to portray Tung as appealing to business because of his ties to established government institutions and public policies of late colonial Hong Kong.<sup>481</sup> Patten and others stressed the importance to the business community of Tung's experience in Exco and his retention of Anson Chan, Donald Tsang, and other key civil servants in senior offices.<sup>482</sup>

In their proponents' view, these arguments served, perhaps primarily, to emphasize an important symbolic thread of continuity with what the colonial authorities saw as the just, legitimate, and accountable institutions and rule of law regime of the past that had served business interests well. These arguments, however, also made a more narrow and direct appeal to the interests of their business audience. They emphasized to the Hong Kong business community the reassuring and appealing prospects of

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<sup>481</sup> See Bruce Gilley, *Henry . . . Who?*, FAR E. ECON. REV., Jan. 9, 1997, at 82.

<sup>482</sup> See Linda Choy & Angela Li, *Chan Congratulates Friend Tung*, S. CHINA MORNING POST, Nov. 19, 1996, at 6; Fung Wai-kong, *Governor and Tung Set to Meet on Monday*, S. CHINA MORNING POST, Dec. 21, 1996, at 1; John Ridding & Louise Lucas, *Tung to Keep Top HK Officials*, FIN. TIMES, Feb. 21, 1997, at 8.

continuity in economic policy and the predictability of familiar faces and experienced hands in government.

On the Chief Executive selection issue, as on the other major legal-institutional issues of the endgame, arguments in favor of relatively robust liberal and democratic reform initially struck a chord with the territory's business elites, but resonated much more weakly with that vital audience as the date of Hong Kong's reversion drew near. During the protracted speculation over who might seek the post and have a realistic chance of winning it, leading figures in the territory's business community at times appeared to echo Hong Kong's democratic politicians. Some openly worried that selecting one of their own to the post would raise the prospect of a merger of political and economic power that could generate serious conflicts of interest and threaten to upset Hong Kong's much-praised (if not always present) "level playing field." Many among the colony's business elite voiced support for distinctly non-business candidates drawn from institutions closely associated with the territory's rule-of-law establishment, including top civil servant Anson Chan and Chief Justice Yang Ti-liang.<sup>483</sup>

By the time of Tung's appointment and certainly by the date of his formal selection, however, expressions of support for the choice had replaced such expressions of concern among the territory's business leaders. The business community appeared to accept not only the process that chose Tung, but also many of the policies that Tung said he intended to pursue (including roll-backs of rights and civil liberties legislation and close cooperation with the Provisional Legislature).

Faced with such developments, the Hong Kong politicians who had long criticized the Chief Executive selection process, and the colonial government that had long accepted the arrangement, tried to convince business to support a moderate use of the office by Tung, one that would not undermine features of late colonial

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<sup>483</sup> See, e.g., Frank Ching, *Tung: A Reluctant Candidate*, FAR E. ECON. REV., July 25, 1996, at 40 (discussing business groups' concerns about Tung's ties to powerful tycoon Li Ka-shing); Angela Li, *Businessman Expresses Doubts over British Links*, S. CHINA MORNING POST, Nov. 9, 1996, at 6 (describing a business leader's concerns over Tung's ties to the powerful Hongkong and Shanghai Bank and noting some business leaders' support for Yang's candidacy); *Straw Poll: Who Will Make the Best Chief Executive?*, *supra* note 342, at 28 (presenting views of several business leaders on appropriate Chief Executive candidates).

Hong Kong's laws, institutions, and nascent reforms that adherents to a broadly liberal-democratic vision of legality considered vital to a rule of law for Hong Kong that satisfied both the demands of a just and proper order and the real needs of the business community.<sup>484</sup> They did not pursue this agenda principally through arguments that narrowly addressed the Chief Executive question. Rather, they relied on their arguments about why business should not support a reversal of Bill of Rights provisions and an overturning of civil liberties legislation, and why business should not be an accomplice to the Provisional Legislature's betrayals of Hong Kong's interests and recent legal and constitutional accomplishments.<sup>485</sup>

### 3.3. *Business and the China and "Pro-China" Hong Kong Vision of the Rule of Law*

During the several years leading up to Hong Kong's return to Chinese rule, official Chinese statements\* and "pro-China" individuals and organizations in Hong Kong, accepted the idea that business wanted and needed the rule of law to survive in post-reversion Hong Kong. Official Chinese and Hong Kong pro-China comments repeatedly stressed to business audiences that Hong Kong's legal system and its prior laws generally, and its business-related laws and policies specifically, would remain in tact after the establishment of the S.A.R., just as China had promised in the Joint Declaration, the Basic Law, and elsewhere.<sup>486</sup>

China, these sources assured the business community, knew better than to undermine the essential legal and institutional

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<sup>484</sup> See, e.g., Ng, *supra* note 42; Emily Lau, *Letter to Hong Kong* (Hong Kong radio broadcast, Dec. 15, 1996), transcribed in BBC Summary of World Broadcasts, Dec. 18, 1996, available in LEXIS, Asiapc Library, Allasi File.

<sup>485</sup> See *supra* Sections 3.2.1, 3.2.2; see also Gilley, *supra* note 59, at 15 (describing liberal arguments against and business worries about Tung's policies).

<sup>486</sup> See Basic Law, *supra* note 21, arts. 8, 85, 160 (providing for continuity in the laws and the legal system and autonomy of local legal institutions); Joint Declaration, *supra* note 39, § 3(3), annex I, art. II; Basic Law, *supra* note 21, arts. 5, 105-19 (providing for the preservation of Hong Kong's capitalist economic system and continuity and autonomy in Hong Kong's property rights, fiscal, monetary, financial, and foreign trade regimes); Joint Declaration, *supra* note 39, § 3(5)-(10), annex I, arts. V-VII; see also, Hsieh Ming, "The Death of Hong Kong"? To Hell with "Fortune", TA KUNG PAO, June 15, 1995, at A9 (refuting a *Fortune* magazine article foreseeing the decline of Hong Kong after "everything" changes in 1997).

elements of Hong Kong's economic success. Politburo Standing Committee member Li Ruihuan compared Hong Kong to a priceless *yixing* teapot which would lose its value if scrubbed too hard in an effort to clean it.<sup>487</sup> A senior Chinese official reportedly assured a prominent Hong Kong businessman that China would not repeat the economically harmful mistake it had made in Macau of becoming "far too involved"<sup>488</sup> in local affairs.<sup>489</sup> Hong Kong and Macau Affairs Office Director Lu Ping assured the territory's General Chamber of Commerce that "a prosperous Hong Kong means a prosperous China" and that China would accordingly do what was necessary to preserve Hong Kong's economic health.<sup>490</sup> More specifically, senior Foreign Ministry and other Chinese officials, along with pro-China voices in the territory, frequently reassured international business leaders that foreign business interests would continue to be protected by Hong Kong's prior laws after 1997.<sup>491</sup>

In promising a rule-of-law system adequate to satisfy the needs and wants of the territory's business elites, China and its Hong Kong allies contemplated a set of rule-of-law values, coordinate laws, and institutions that were quite different from those which colonial authorities and Hong Kong's liberal and democratic politicians claimed were necessary to satisfy and sustain the business community. At the very least, constructing an S.A.R. legal order acceptable to business could not impose such extensive restrictions on China's sovereign discretion or derive its authority from institutions or procedures so insulated from legitimate control by the central Chinese government that it threatened to

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<sup>487</sup> See *Text of Li Ruihuan's Remarks to Hong Kong and Macao Representatives to the Chinese People's Political Consultative Conference*, *supra* note 222, Mar. 14, 1995, at B5.

<sup>488</sup> Gilley, *supra* note 24, at 72 (quoting a prominent local businessman's account of a discussion with a senior Chinese official).

<sup>489</sup> See *id.*

<sup>490</sup> Lau, *supra* note 449, at 11.

<sup>491</sup> See, e.g., *Chinese Foreign Minister: Foreign Interests in Hong Kong To Be Protected by Law*, WEN WEI PO, July 24, 1996, at A12, translated in BBC Summary of World Broadcasts, July 25, 1996, available in LEXIS, Asiapc Library, Allasi File (quoting Foreign Minister Qian Qichen); *HK's New Chief Spells Out What Is Needed To Move Forward*, STRAITS TIMES (Singapore), Dec. 24, 1996, at 20 (citing Tung Chee-hwa's statement that "[w]e must particularly reaffirm to our international friends the integrity of our legal framework" and the "level playing field" it provides).

exceed the limits demanded by the generally positivist vision of domestic legal authority that China and its political agents and allies in Hong Kong shared.

China and its allies in the territory envisioned that a set of laws and institutions acceptable to Hong Kong's business community would stop short of testing these limits. To varying degrees and at different times, they suggested that the maintenance of prosperity in Hong Kong, and the confidence of the business sector on which prosperity depended, required only a fairly modest rule of law. The notion of a sufficient rule of law for business sometimes could sound very crabbed, especially when articulated by some members of the top echelons of the leadership in Beijing or at moments of particularly tense relations between the P.R.C. and British or Hong Kong officials and politicians. Chinese leader Jiang Zemin stressed that "Hong Kong's prosperity in the past cannot be attributed . . . to an independent judiciary and a free system of the press."<sup>492</sup> An editorial in the resolutely pro-China newspaper *Wen Wei Po*, amid some of the sharpest conflicts over Patten's constitutional reforms, commented that China's growing economic prowess, and not the careful preservation or extension of the colonial legal and institutional order, was "the fundamental guarantee for Hong Kong's smooth transition and continued prosperity."<sup>493</sup>

Further, some China and pro-China sources hinted that the specter of a somewhat "politicized" allocation of business opportunities under Chinese rule would not be fatal to business confidence in Hong Kong. Indeed, official Chinese sources charged that the British authorities had already introduced political considerations into economic dealings with the territory's businesses during the transition and, in doing so, had merely extended a long-standing pattern of cozy relationships between the colonial government and its favored companies, often ones with

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<sup>492</sup> Ching, *supra* note 223, at 36 (quoting remarks of Jiang Zemin); cf. *Zhu Rongji Meets Hong Kong Delegation*, Xinhua, Jan. 17, 1996, available in LEXIS, Asiapc Library, Allasi File (reporting senior Chinese official's comments that Hong Kong's success depended greatly on Hong Kong's links to the mainland's economic development).

<sup>493</sup> *Preparation Means Success; No Preparation Means Failure*, WEN WEI PO, Dec. 12, 1993, at 2.

British roots or ties.<sup>494</sup>

The China and pro-China camp's apparent confidence that business would ultimately accept a rule-of-law regime that was also acceptable to China likely stemmed in part from the statements and actions of much of the territory's indigenous and international business elites. Aside from a few brief downturns, these elites had kept Hong Kong's securities markets and bond ratings buoyant throughout the transition. Many of the business community's most audible voices routinely and loudly expressed confidence in Hong Kong's future prosperity. The broader business community continued to invest, in what critics derided as a lawless mainland China. In making and managing many of those investments through their offices in Hong Kong, members of the territory's elite business community also made China-linked ventures, and the legal and political risks they entailed, an increasingly central part of their business in Hong Kong.<sup>495</sup>

Except for occasional intemperate comments and despite a possible belief that Hong Kong business might not demand a very strong rule of law, China and Hong Kong's pro-China forces usually remained fairly circumspect in their discussions of business attitudes and the rule of law. Through comments directed at the territory's business community, and through repeated invocations of relevant provisions in the Basic Law and the Joint Declaration, they regularly offered reassurances that legal protections for investors would survive the transition. They also argued that controversial legal changes planned for post-reversion Hong Kong

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<sup>494</sup> See, e.g., Ma Ling, *Lu Ping Talks About Three Issues, Criticizes British Side for Lacking Sincerity in Cooperation*, TA KUNG PAO, Jan. 18, 1994, at 2 (reporting Lu Ping's view that the British used colonial governmental powers to advance British business interests); Yeung & Law, *supra* note 453, at 1 (discussing Xinhua Hong Kong's accusation that the colonial government granted business favors based on political considerations).

<sup>495</sup> See, e.g., Gilley, *supra* note 24, at 72 (outlining China's business involvement in Hong Kong prior to July 1, 1997); *Hong Kong's Experiences in Investing in the Hinterland*, TA KUNG PAO, Nov. 24, 1994, at 9 (quoting Li Kashing); Jonathan Sprague, *S&P Says H.K. Credit Safe Amidst Sino-British Rows*, Reuters, Feb. 13, 1995, available in LEXIS, Asiapc Library, Allasi File (noting Standard and Poor's upgrade of Hong Kong's currency rating); *The Shadow over Hong Kong*, ECONOMIST, Apr. 3, 1993, at 37 (noting the rise in the stock market following what some saw as a threat of increased Chinese government intervention); *U.S. Businesses Confident on Hong Kong and China*, Reuters, Nov. 23, 1995, available in LEXIS, Asiapc Library, Allasi File (noting U.S. business confidence in Hong Kong's future after the territory's reversion to China).

posed no threat to the rule of law that business needed and wanted. As China and its allies saw it, those changes primarily would be mere reversals of prosperity-threatening, Basic Law-violating and Joint Declaration-breaching innovations that Hong Kong's colonial masters had irresponsibly introduced on the eve of their departure.

Still, the version of legality that China and its Hong Kong supporters articulated in their public statements and in their interpretations of the Joint Declaration and the Basic Law did not imply that the S.A.R. would provide a legal order that was as liberal and robust as Hong Kong had enjoyed during the 1980s or before. Although cautiously expressed, the China and pro-China view remained fully consistent with pursuing a retrenchment not only from late colonial innovations, but also from Hong Kong's more modestly liberal and democratic pre-Tiananmen Incident baseline of laws and institutions.

While Chinese officials and Hong Kong's pro-China elements thus shared the view that business would support or accept an arrangement that China could provide in an exercise of its discretionary sovereign authority over the territory, and that China would be willing to accept as consistent with the requirements of preserving China's sovereignty, the contours of that legal order did not emerge fully in general discussions of a rule of law for Hong Kong. They took clearer shape, amid occasional splits and shifts in the "China camp's" positions, in the endgame battles over business attitudes toward the concrete legal and institutional arrangements for the S.A.R.

### 3.3.1. *The Bill of Rights, the Reversal of Late Colonial Laws, and the Requisites of Order*

Although China clearly objected to the enactment of Hong Kong's Bill of Rights Ordinance, the leadership in Beijing appears to have recognized that there was little chance of preventing the colonial government's adoption of the Ordinance in the wake of Hong Kong's reaction to the Tiananmen demonstrations of 1989 and China's violent suppression of them. China initially made little overt effort to point out or draw forth business support for its position on the Bill of Rights or other reforms to liberties-restricting colonial laws. Early on, official P.R.C. statements did little more than put the business community and everyone else on notice of China's displeasure and its reserved right to review and

repeal any legislation it deemed incompatible with the Basic Law.<sup>496</sup> The Chinese authorities thus reiterated the basic positivist point that, whatever portion of the newly enacted liberties Hong Kong's business community and ordinary citizens would retain after reversion, they would possess such legal rights as the product of direct or delegated exercises of the P.R.C.'s sovereign power.

Later in the 1990s, China and pro-China elements in Hong Kong began to work harder to garner business support on rights-related issues. China and its Hong Kong allies pointed out the dangers that business would face if the S.A.R. were to leave in place liberal changes to laws governing political associations, rallies and free speech, and sections of the Bill of Rights allowing courts aggressively to interpret or strike down rights-limiting laws. They further argued that the colonial government's eleventh-hour changes in Hong Kong's laws risked, in Lu Ping's phrase, transforming Hong Kong from an "economic city," where business had flourished, into a "political city" beset by social unrest and declining prosperity.<sup>497</sup> Chinese and pro-China sources cautioned that the colonial government's supposedly liberty-protecting reforms to the Societies and Public Order Ordinances would protect law-breakers and hinder the S.A.R. government's ability to provide the social order that the business community wanted and needed.<sup>498</sup>

Hong Kong and Macau Affairs Office Director Lu Ping and the glowing coverage in the pro-China press of Chief Executive-designate Tung's early comments on rights issues asserted that reversing late colonial changes to the Public Order and Societies Ordinances would not abolish the rights that enjoyed undeniable popularity in Hong Kong or produce popular discontent and unrest that would threaten business interests. The changes that

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<sup>496</sup> See, e.g., *Zhang Junsheng Stresses PWC Opinion of Bill of Rights Is Reasonable and Legitimate*, *supra* note 232, at A1 (noting the Chinese Foreign Ministry statement issued at the time of the introduction of the Bill of Rights legislation in Legco).

<sup>497</sup> See *Tung Chee-hwa Says that Proposals of Legal Subgroup Are Good*, *supra* note 238, at A2; *Be Vigilant Against Instigating Political Confrontation*, *supra* note 306, at A2.

<sup>498</sup> See *Tung Chee-hwa Says that Proposals of Legal Subgroup Are Good*, *supra* note 238; *Be Vigilant Against Instigating Political Confrontation*, *supra* note 306, at A2.



the P.R.C. and its Hong Kong allies favored would merely help to reestablish a proper balance between individual rights and society's interest in order<sup>499</sup> — something that business elites sensitive to both rights and economic issues could surely appreciate. P.R.C. sources and commentaries in Hong Kong's pro-China press (frequently quoting Tung) insisted that the changes were relatively modest and did not portend a general rejection of human rights, which were amply protected under the Joint Declaration, the Basic Law, and Hong Kong laws that would survive the transition.<sup>500</sup> Further, Xinhua Hong Kong Branch Deputy Director Zhang Junsheng suggested that the planned moves to eliminate late colonial legal changes implied no threat to any rule of law valued by Hong Kong business elites. Rather, just as China had argued in opposing the enactment of the Bill of Rights Ordinance in 1991, these changes would only correct the colonial authorities' moves to "introduce a law overriding the Basic Law and other Hong Kong laws" and to "cripple Hong Kong's existing legal system."<sup>501</sup>

China and pro-China sources urged the business community not to take seriously the colonial government's and Hong Kong liberals' alarming predictions about the consequences of changing rights laws that had been adopted or amended during the 1990s. Contrary to the arguments Governor Patten, Martin Lee and others pressed, the impending repeal of late colonial legislation was no threat to Hong Kong's prosperity. Rather, the pro-China newspaper *Wen Wei Po* editorialized, the real risk to Hong Kong business was the possibility that foreign investment and trade might fall in response to the fantastical horror stories about the consequences of altering rights laws that British and colonial

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<sup>499</sup> See Lu Ping *Stresses Partial Abrogation of Some Ordinances Amended by British Hong Kong Government Is Intended To Maintain Hong Kong's Prosperity and Stability*, WEN WEI PO, Jan. 26, 1997, at A11.

<sup>500</sup> See, e.g., Ray Bashford, *Core Confidence Edges Out Doubt*, S. CHINA MORNING POST, Feb. 23, 1997, at 2 (noting positive market performance after the N.P.C. decision to reject several rights laws); Quak Hiang Whai, *Tung Defends Plans by Beijing To Amend HK Laws*, BUS. TIMES, Jan. 24, 1997, at 6 (quoting Tung Chee-hwa's statement that Beijing's plan to repeal laws would enhance social order).

<sup>501</sup> Zhang Junsheng *Stresses PWC Opinion of Bill of Rights Is Reasonable and Legitimate*, *supra* note 232, at A1.

officials and Hong Kong politicians were spreading abroad.<sup>502</sup> P.R.C. sources and China's allies in Hong Kong also suggested that the apparent public support for the laws facing repeal was not a reason for business to oppose moderate retrenchments that would otherwise be acceptable or appealing to business leaders. They asserted that any popular support for the doomed laws was merely the transient and shallowly-rooted product of a propaganda apparatus controlled by the colonial authorities.<sup>503</sup>

Whether they simply captured underlying business attitudes, or persuaded business to adopt China's position on late colonial rights laws, or convinced business that its best option was to acquiesce in the P.R.C. and pro-China camp's agenda, these arguments provoked little audible opposition in the business community and won considerable support. In contrast to the relatively muted business voices supporting the Bill of Rights and related legislation on the eve of reversion, many of the pro-China business leaders in the territory picked up some of the central points of the arguments favoring retrenchment and asserted that the P.R.C. and pro-China perspective resonated with business' views. Developer and P.W.C. and P.C. member David Chu proclaimed that the relaxation of restrictions on civil liberties and other "things . . . done in the name of freedom and democracy" had deleterious "side-effects" to which the government had paid too little attention.<sup>504</sup> Moreover, Chu suggested that the China side's argument about the impropriety of major last-minute moves to liberalize Hong Kong law was something his fellow participants in commerce should appreciate: "You don't want the current owner making drastic changes after you've already signed the deed."<sup>505</sup>

If the broader business community did not share Chu's views, it likely understood the message from China and its closest Hong Kong allies: China and the S.A.R. government would exercise legislative authority over Hong Kong to roll back some late

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<sup>502</sup> See *Tung Chee-hwa's Remarks Are Beneficial to Hong Kong's Prosperity*, *supra* note 238, at A4.

<sup>503</sup> See *id.*; *Tung Chee-hwa Says that Proposals of Legal Subgroup Are Good*, *supra* note 238, at A2.

<sup>504</sup> *For Many Corporate Chiefs, 1997 Cannot Come Soon Enough*, *supra* note 401, at 22, 22.

<sup>505</sup> Maggie Farley, *Wary of China, Text Publishers Stop the Presses*, L.A. TIMES, Dec. 16, 1994, at A5.

colonial legal changes, with relatively little regard for the modest opposition — or support — that such moves might engender in Hong Kong business circles. Chu's analogy to a real estate transaction also suggested at least an intuitive understanding in the business community of a more fundamental feature of the P.R.C. and pro-China approach to the controversy over Hong Kong rights laws. For China and its closest supporters and agents in Hong Kong, the content of rights legislation, like many of the terms of a real estate contract, was a matter of choice and discretion, not the reflection of fundamental truths or the implementation of fixed substantive norms.

### 3.3.2. *The Legislature, the Patten Reforms, and the Costs of Opposition*

Like their arguments concerning the Bill of Rights and civil liberties, the arguments that China and its supporters deployed to induce business to oppose Patten's electoral reform package and to support China's decision to replace Legco with a Provisional Legislature sought to appeal to the narrow self-interest of the territory's business elites and their ability to calculate costs and benefits. On these issues of democratization and the legislature, intramural and temporal variations within the China and pro-China camp over the details of how to address the business community were somewhat more visible than they were in the debates over rolling back rights legislation. Various official Chinese and pro-China Hong Kong sources disagreed mildly or changed their opinions slightly about the established or instillable views and values of the business community and their implications for the degree of democratic change that the P.R.C. and the S.A.R. governments, as the wielders of sovereign power, would be prudent to accept in order to insure a smooth transition, a prosperous and stable Hong Kong, and the preservation of China's ultimate sovereign power and discretion.

Official P.R.C. spokespeople and China's closest compatriots in Hong Kong warned that, much like the late colonial changes to civil and political liberties legislation, Patten's reforms to the electoral laws would result in economically harmful social instability. The pro-P.R.C. newspaper *Ta Kung Pao* cautioned that the Governor's plans would "jeopardize prosperity and

stability”<sup>506</sup> and would harm the economic interests of foreign and domestic investors. Surely, the territory’s business leaders would not welcome such a result. Moreover, the pro-China press asserted that some of the predicted “turbulence” had already materialized and had weakened the economy in the immediate aftermath of Patten’s proposals, even before those proposals had become law or been implemented.<sup>507</sup> Lu Ping underscored the point, asserting that the Chinese side would never cause chaos harmful to Hong Kong, while the British side’s political reform proposals already had.<sup>508</sup>

China and pro-China sources argued further that the broadened franchise that Patten planned to introduce threatened to produce a Legco dominated by politicians hostile to business interests. Official Chinese commentaries asserted that Patten’s expansion and restructuring of functional constituencies to give nearly all working Hong Kongers a vote in those constituencies (in addition to their votes in universal suffrage geographic constituencies) constituted a devastating attack on a system of representation that had “ensure[d] business and financial sectors and those organizations and professionals that play a special role in Hong Kong will be represented in the Legislative Council.”<sup>509</sup> Simply stated, these P.R.C. and pro-China voices argued to business leaders that Patten was trying to silence the business elites’ prominent voice in the territory’s government.

Moreover, Chinese spokesmen and prominent pro-China voices in Hong Kong argued, Patten’s moves would assure that anti-business voices would grow louder and more influential in the halls of Hong Kong government. They charged that, under Patten’s electoral regime, in the place of reliably pro-business representatives, the voters comprising the expanded electorate were sure to place “a lot of radicals in the legislature.”<sup>510</sup> P.R.C.

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<sup>506</sup> *Mr. Patten’s Choice*, *supra* note 261, at 2.

<sup>507</sup> *See Deng’s Remarks Have Practical Significance, and Those Who Label Them ‘Outdated’ Are Making a Big Mistake*, WEN WEI PO, Sept. 27, 1993.

<sup>508</sup> *See Liu*, *supra* note 450, at 2.

<sup>509</sup> *Text of Chinese Statement on the Breakdown of Sino-British Talks on Hong Kong*, *supra* note 265 (stating the Chinese position on the reasons for the stalemate in Sino-British talks on constitutional and electoral reform in Hong Kong).

<sup>510</sup> do Rosario, *supra* note 91, at 20; *see also* Yeung & Wong, *supra* note 324, at 21 (quoting Shiu Sin-por, head of a pro-China think tank, stating that

and pro-China Hong Kong sources warned that the new Legco members sure to be chosen under Patten's rules would join with Patten's government to pursue laws and policies that were anathema to Hong Kong's pro-free-market and anti-regulatory business community. In particular, criticisms of the Patten reforms stressed that the colonial administration-Legco democrat government would engage in excessive social spending that not only would require raising taxes, but also would sap Hong Kong's vital and formidable work ethic.<sup>511</sup> A leader of the territory's leading pro-China party opined that the business community was quite worried about this possibility.<sup>512</sup>

In addition to these arguments addressing the assumed preexisting material interests of the business elite, China took a number of steps to structure the incentives facing business. China thus delayed progress on the airport and infrastructure projects that business saw as vital to the territory's continued prosperity (as well as a source of lucrative contracts for some of Hong Kong's biggest companies). China was clear that it did so largely in response to the British authorities' intransigence on political reform.<sup>513</sup> Guo Fengmin, of the Chinese delegation to the Sino-British Joint Liaison Group, explained the policy and its grounding in P.R.C.-style positivist legal principles. *Wen Wei Po* paraphrased Guo's comments:

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business would welcome a more "balanced" legislature).

<sup>511</sup> See, Karp, *Money Talks*, *supra* note 454, at 18 (quoting Bank of China economist Xu Yongfu, that government's social spending plans threatened to sap Hong Kong's "spirit of diligence" and would create "a welfare society"); see also do Rosario, *supra* note 301, at 29 (citing business fears that Democratic Party proposals could "harm Hong Kong's free-market spirit").

<sup>512</sup> See do Rosario, *supra* note 91, at 20; see also *For Many Corporate Chiefs, 1997 Cannot Come Soon Enough*, *supra* note 401, at 22 (quoting business leader Vincent Lo's statement that business had serious concerns regarding social spending).

<sup>513</sup> See, e.g., Louise do Rosario, *Incoming Fire*, FAR E. ECON. REV., Dec. 16, 1993, at 20 (describing political reform issues and infrastructure projects mixing politics and economics at J.L.G. sessions); Stacy Mosher, *Straight Talk*, FAR E. ECON. REV., July 2, 1992, at 19 (describing the entanglement of the airport issue with Chinese objections to pre-Patten political reform plans of British side); Tai Ming Cheung, *Glacial Thaw*, FAR E. ECON. REV., July 22, 1993, at 13 (discussing the progress on airport issue and on electoral reforms at bilateral talks); James Tien, *Hong Kong Can Survive Under One Country, One System*, S. CHINA MORNING POST, May 2, 1993, at 11 (criticizing China's postponement of infrastructure projects in opposition to Patten's reforms).

China, is very clear on its position on Christopher Patten's move to table his so-called constitutional reform package to Legco. Although the J.L.G. has its own agenda and issues, these are all conducted on the basis of the Joint Declaration and the Basic Law. J.L.G. work will of course be affected if this basis is undermined [by the adoption of reform proposals that failed to conform to the Basic Law and Joint Declaration.]<sup>514</sup>

Although Chinese and pro-China arguments generally addressed the business community as a rather undifferentiated whole, China's actions specifically targeted Hong Kong firms backing the Patten proposals for more particularized retaliation, and warned British companies that they could see their interests and prospects in Hong Kong and China suffer if the colonial government did not back down on political reform.<sup>515</sup> Raising the stakes further, Chinese officials indicated that reversion-straddling government contracts might require approval from China, essentially as a proxy for the S.A.R. post-reversion government.<sup>516</sup> Amid some of the sharpest conflicts over the political reform issue, Chinese Vice Premier Zhu Rongji even threatened that Patten's failure to compromise might leave China free to disregard the Joint Declaration, thus removing a crucial, positive law underpinning of the legal order on which business depended.<sup>517</sup>

The calculus that China expected Hong Kong business to undertake was surely clear to the territory's business elites.

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<sup>514</sup> Yu Chi-ping & Tai Pao-erh, *Joint Liaison Group Meeting Ends with Agreeing on Next Session*, WEN WEI PO, Dec. 10, 1993, at 11.

<sup>515</sup> See Huang Chen-ya, *Jardine's Salvo Is HK's Wake-Up Call*, S. CHINA MORNING POST, Dec. 20, 1992; Li, *supra* note 299, Feb. 28, 1994, at 48-49 (asserting that "a considerable number of British-invested financial groups had found that their London background had become a 'burden' in China trade"); Nick Rufford, *Patten Worries the Money Men*, SUNDAY TIMES (London), July 3, 1994; Tai Ming Cheung, *Frontal Assault*, FAR E. ECON. REV., Apr. 1, 1993, at 10 (describing the comments of P.R.C. Minister of Foreign Trade Li Lanqing); Yeung & Law, *supra* note 453, at 1.

<sup>516</sup> See Tai, *supra* note 451, at 8.

<sup>517</sup> See Tai Ming Cheung, *Embattled Governor*, FAR E. ECON. REV., Nov. 26, 1992, at 10.

Business leaders with interests in Hong Kong, or even in China, that were supporting Patten's or Hong Kong democrats' agenda could expect, individually or collectively, to pay a heavy economic price. Still, Chinese officials, especially those directly involved in the handling of Hong Kong affairs, typically stopped well short of Zhu Rongji's threats and sometimes retreated from aggressive positions that seemed to be shaking business confidence. They tried to reassure business that China's resort to such hard-ball tactics in opposing changes to constitutional and electoral law should not be interpreted as indicating a willingness or inclination to undermine the core commercial legal order that the Chinese side recognized business required. Thus, Lu Ping explained that the problem with contracts that extended through and beyond 1997 did not include "non-governmental contracts," and that China hoped that governmental contracts "will extend beyond 1997, and that the people concerned will be able to set their minds at rest."<sup>518</sup> Lu added, "[A]s we constantly declare, we protect and support various types of private capital . . . in Hong Kong."<sup>519</sup> An official Chinese statement similarly pledged that "China would take a positive attitude in examining and approving" the problematic contracts.<sup>520</sup> Indeed, Lu Ping explained, China demanded that government contracts extending beyond 1997 "must be discussed with the Chinese government" precisely because that was necessary to provide parties to those contracts with "legal protection."<sup>521</sup>

China and its Hong Kong agents and supporters also suggested to the business community that the apparent popularity of democratic reform in the territory was no reason to side with the Patten program.<sup>522</sup> They argued that what seemed like genuine popular sentiment in favor of the governor's agenda was really the result of Patten temporarily duping many people into believing

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<sup>518</sup> Liu, *supra* note 450, at 2; see also Tai, *supra* note 450, at 9 (quoting an official Chinese statement that "the Chinese Government reiterated that investments in Hongkong [sic] by private capital from both Chinese and foreign sources remain welcome").

<sup>519</sup> Liu, *supra* note 450, at 2.

<sup>520</sup> Tai, *supra* note 450, at 9.

<sup>521</sup> Liu, *supra* note 450, at 2.

<sup>522</sup> See *Just Keep a Watch over Mr. Chris Patten's Performance*, *supra* note 287.

that his reforms were not harmful.<sup>523</sup> Once the people learned the truth about how dangerous the Patten reforms were (or how futile supporting them would be), ordinary Hong Kongers would not respond to a rolling back of those reforms by wreaking havoc on Hong Kong's economy. Moreover, Chinese and pro-China sources added that the implementation of reformed electoral laws produced rather unimpressive voter turnouts despite the propaganda blitz that the colonial government was uniquely positioned to deliver on their behalf.<sup>524</sup>

China and pro-China commentaries further assured business that, to the extent that "democracy" was genuinely popular, opposition to the Patten plan was still a sensible position, because rejecting Patten did not mean rejecting democracy. According to this line of argument, adequate democracy for Hong Kong would be provided, in proper positivist fashion, under arrangements that China had endorsed and helped to create, including the Basic Law which provided the essential framework for the smooth and orderly development of democracy. P.R.C. and pro-China sources stressed that this democracy would be far more extensive than what the British colonial authorities had heretofore provided in a century and a half of ruling Hong Kong, and not far short of the modest proposals that leading business figures and pro-business members of Legco and Exco had backed in the wake of the Tiananmen Incident.<sup>525</sup> If mere words were not enough to convince the business community that China and its allies would accept democracy sufficient to satisfy the business community's demands or to assuage the business community's fears about the consequences of unsatisfied popular demands, there were actions as well. As tangible evidence of their tolerance for the degree and form of democracy that the business community required, China

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<sup>523</sup> See *id.* (asserting that Patten ignores the Basic Law and attempts to dupe the Hong Kong people).

<sup>524</sup> See Chen, *supra* note 272; do Rosario, *Sharp Distinction*, *supra* note 112, at 29; do Rosario, *supra* note 106, at 16; Gilley, *supra* note 24, at 72.

<sup>525</sup> See Lau, *supra* note 256, at 14-15, *supra* note 445, at 26-27. Xinhua Hong Kong Deputy Director Zhang Junsheng argued that the controversy over the Patten electoral reforms was not about "democracy or the pace of democracy"; rather, it was about whether the British would live up to their agreement to make the last colonial Legco one that complied with the conditions for becoming the S.A.R.'s first legislature under the Basic Law. See H.D.S. Greenway, *Hong Kong Chief Defends Reform Moves*, BOSTON GLOBE, Mar. 21, 1993, at 19.



and pro-China voices in Hong Kong could point to pro-China parties' full participation in the final colonial era elections, and to pro-China Legco members' frequent support for laws and policies that the business community favored.<sup>526</sup>

By pressuring and persuading the business community to back China's positions, or by emboldening business leaders to express their pre-existing opposition to Patten's reforms, these arguments and actions from official Chinese sources and Hong Kong's pro-China circles seemed to achieve some of their aims.<sup>527</sup> Shortly after Patten proposed his reforms, many business leaders began a sustained call for their withdrawal or rejection by Legco.<sup>528</sup> One expatriate executive urged Patten to "forget about democracy for the time being" and return the focus to Hong Kong's "fundamental law" of furthering the territory's economic prosperity.<sup>529</sup> Bankers Trust Managing Director William Overholt warned that pressing forward with the reforms could give China a sense of "moral and legal right to destroy the rule of law, democracy and autonomy which we all want for Hong Kong."<sup>530</sup> Among the Hong Kong Chinese business elite, businessman and politician James Tien inveighed against Patten's

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<sup>526</sup> See, e.g., do Rosario, *supra* note 275, at 26-27 (discussing Chinese support for political candidates); Louise do Rosario, *Board Game*, FAR E. ECON. REV., Sept. 8, 1994, at 18-19 (noting China's encouragement of pro-China candidates); do Rosario, *supra* note 301, at 28 (noting China's and pro-China press' support for the D.A.B.); see also Tai, *supra* note 318, at 20 (quoting D.A.B.'s Tsang Yok-sing's statement that his party would have to defer to majority support for Patten's reforms if such support were shown to exist).

<sup>527</sup> Compare Martin C.M. Lee, *Beijing's Tiananmen Mentality Augurs Ill for Hong Kong*, INT'L HERALD TRIB., June 23, 1994 (arguing that business had been pressured and cowed into adopting a "pro-China" line), with Chris Yeung & Fung Wai-kong, *Liberals Look To Take Lead in Legco*, S. CHINA MORNING POST, July 1, 1994, at 25 (arguing that business interests were already very much opposed to Patten's reforms and, indeed, lobbied Beijing to support business' opposition).

<sup>528</sup> See Edward Mortimer, *Divide and Rule: Businessmen Lean Towards Beijing, but the People Favour Patten*, FIN. TIMES, Mar. 17, 1993, at 16; Rufford, *supra* note 517; *Xinhua's Zhou Nan Reaffirms Chinese Stance on Hong Kong*, *supra* note 277 ("A few hundred influential organizations from the industrial and commercial circles . . . issued statements opposing the Hong Kong British authorities' political reform programme.").

<sup>529</sup> *HK Must Speak with One Voice*, S. CHINA MORNING POST, Nov. 1, 1992, at 10 (quoting Sir Gordon Macwhinnie, former chairman of the Hong Kong Jockey Club).

<sup>530</sup> Louise do Rosario, *Democracy's Pros and Cons*, FAR E. ECON. REV., Mar. 24, 1994, at 24.

attempts to "redefine all the grey areas" in the Basic Law in an effort to find a legal basis for his reforms.<sup>531</sup> Vincent Lo, chairman of the Business and Professionals Federation ("B.P.F.") and of a major real estate and property development firm, argued that "democracy is important, but it is not the only goal. A smooth transition is more important."<sup>532</sup>

Hong Kong's pro-China press praised the B.P.F. view and other endorsements of "convergence" between Hong Kong's pre-1997 political development and the initial S.A.R. order that China and its allies favored as "pragmatic" rejections of the Patten proposals, and as indicative of "a profound understanding" of the requisites of Hong Kong's political stability and the economic prosperity that political stability made possible.<sup>533</sup> A P.R.C. commentary smugly noted that it was hardly surprising that "British business circles, which always set great store by business interests, are dissatisfied with Patten."<sup>534</sup> Presumably, non-British firms with substantial interests in the territory were no more supportive of Patten's reforms, but were not as well positioned to make their views matter with Hong Kong's colonial rulers.

China and its Hong Kong allies found further evidence of business support for their positions on political reform at the points where business and politics were most closely entwined. Business and pro-business officeholders in Hong Kong took a position similar to that of many vocally pro-China members of the group they represented. Several of the business leaders in the cabinet-like Exco failed to defend the Patten package, and one, the chairman of the Federation of Hong Kong Industries, called for its defeat.<sup>535</sup> Liberal Party and other pro-business members of Legco joined pro-China representatives in a nearly successful effort to vote down the bill Patten tabled.<sup>536</sup>

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<sup>531</sup> Tien, *supra* note 446, at 11.

<sup>532</sup> Tai, *supra* note 517, at 10.

<sup>533</sup> *The Strong Points of Business and Professional Circles Are Precisely the Weaknesses of Chris Patten*, WEN WEI PO, Nov. 11, 1992, at 2.

<sup>534</sup> Li, *supra* note 299, at 48-49 (recounting criticisms of Patten in the British press).

<sup>535</sup> See Andy Ho, *Why Patten's Exco Might Still Come to the Party*, S. CHINA MORNING POST, July 21, 1994, at 17.

<sup>536</sup> See Mary Kwang, *What Victory?*, STRAITS TIMES (Singapore) July 2, 1994, at 4; Lu Ping Interview on Need for Urgency in Dealing with Hong Kong's

Once the through train for Legco had been decisively derailed by China's determination to dissolve the body selected in the elections held under the Patten reforms, China and its Hong Kong allies argued that the business community should and would welcome the Provisional Legislature that would replace Legco. "Business will find it a blessing to have a [Provisional L]egislature which is supportive of the [S.A.R.] administration," is not dominated by the Democrats, and which is able to "provide a breathing space and a relatively stable government," said the head of the pro-China One Country Two Systems Economic Research Institute.<sup>537</sup> China's and its Hong Kong allies' assurances that the new legislature would have the requisite pro-business and pro-China leanings took tangible form with the selection of members of the Provisional Legislature and the powerful S.A.R. cabinet. A generous share of the seats in both organs went to politically reliable members of the territory's business elite.<sup>538</sup>

The China and pro-China arguments to the business community also emphasized more structural features of the planned Provisional Legislature arrangement. The replacement of Legco by the interim body was heralded as a return to the traditions of "executive-led" government that had served business so well and that Patten, on the China and pro-China side's reading, had undermined when he expanded Legco's role in government by submitting the first C.F.A. bill, the electoral law reforms and other important matters for the formerly docile body's unfettered consideration.

With the dissolution of the 1995 Legco irrevocably decided, the new legislature's early establishment and readiness to begin work by July 1, 1997 would avoid the dreaded "legislative vacuum" and assure the "normal operation" of the S.A.R. government, all of which the China and pro-China camp expected

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*Transition* (China Central Television broadcast, July 5, 1994), transcribed in BBC Summary of World Broadcasts, July 8, 1994, available in LEXIS, Asiapc Library, Allasi File (quoting the Hong Kong and Macao Affairs Office Director's statement that "[a]lthough Patten's constitutional reform packages was passed today, there [were] quite a few negative votes . . . [showing] that there is a substantial dissenting voice in the British Hong Kong Legco"); Tai, *supra* note 104, at 8; Yeung & Fung, *supra* note 527, at 25.

<sup>537</sup> Yeung & Wong, *supra* note 324, at 21 (quoting Shiu Sin-por).

<sup>538</sup> See Rhonda Lam Wan & Rodger Lee, *Team a "Reward" for Pro-China Politicians*, S. CHINA MORNING POST, Jan. 25, 1997, at 3.

the business community, with its aversion to uncertainty, to value.<sup>539</sup> The Provisional Legislature's controversial consideration of new legislation before Hong Kong's reversion date was, China and its Hong Kong allies asserted, merely a method of serving this goal, not a departure from the commitment to a positivistically valid, N.P.C.-authorized, and Basic Law-abiding arrangement for a transitional legislative body.

On the question of the Provisional Legislature, as in the controversy over the Patten reforms, prominent business voices expressed assent to the views China and its allies were promoting. David Chu again embraced the P.R.C.'s positions, arguing that the "legal vacuum" that would exist "[i]f we did not have a provisional body . . . would be a far greater threat to business confidence" than any of the concerns or conflicts attending its creation.<sup>540</sup> The president of the American Chamber of Commerce in Hong Kong declared that the Provisional Legislature was acceptable to U.S. businesses in the territory, whose leaders were confident that China would not tamper with the key legal requisites of Hong Kong's thriving capitalist system.<sup>541</sup> Hong Kong's General Chamber of Commerce urged the governor to cede the legislative initiative to S.A.R. bodies-in-waiting, calling on Patten to limit himself, during the last months of British rule, to "essential legislation for the immediate good government of Hong Kong and enhancing the transition process to Chinese sovereignty."<sup>542</sup> Developer and B.P.F. head Vincent Lo looked forward to the reestablishment of a "much more balanced political structure" that would retrench the expanded role Patten gave to Legco.<sup>543</sup>

To the extent that these expressed business views were not genuine or representative of the broader business community,

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<sup>539</sup> See *Provisional Legislature Must Be Set Up as Scheduled*, *supra* note 304, at A2.

<sup>540</sup> Gilley, *supra* note 38, at 14.

<sup>541</sup> See *Hong Kong's Dwindling Hopes for Democracy*, BUS. WK., May 11, 1992, at 57; Vivian Lee, *US Investors Shun Debate*, S. CHINA MORNING POST, May 21, 1996, at 6.

<sup>542</sup> Simon Pritchard, *Chamber's Nervousness a Worrisome Pointer*, S. CHINA MORNING POST, Oct. 2, 1996, at 12; see also Louis Won, *The Lines Are Drawn over Legco*, S. CHINA MORNING POST, May 24, 1996, at 23 (quoting James Tien, urging Patten to "accept reality" and allow senior Hong Kong government officials to cooperate with the Provisional Legislature).

<sup>543</sup> *For Many Corporate Chiefs, 1997 Cannot Come Soon Enough*, *supra* note 401, at 22.

China and its Hong Kong associates indicated that any reluctance among business elites to accept the Provisional Legislature would not alter the result. China and pro-China sources sought to cow, if not to convince, business circles by signalling that opposition to the arrangement would be at best futile; it could at worst create risks of instability, unpredictability, and harm to the economy. Qian Qichen and Lu Ping stated the point most succinctly: "the rice was cooked" — that is, Hong Kong's sovereign had made its choice and duly authorized the Preparatory Committee to create a Provisional Legislature, and everyone in Hong Kong simply would have to accept that.<sup>544</sup>

### 3.3.3. *The Court of Final Appeal: Of Pragmatism and Predictability*

Attempts to assert or acquire business support for China's position on the Court of Final Appeal question broadly resembled those made to solicit the business community's backing on other key legal and institutional issues of the endgame, although there were some subtle differences. With the colonial government pledged to support the Court deals and with the Hong Kong business community initially recalcitrant, China and pro-China Hong Kong elements' arguments concerning the C.F.A. deal, and legislation to implement it, tended to be simpler, sparer, and more often made by official P.R.C. sources in this context than in the controversies over rights laws and democratic reforms.

China left the job of implementing the 1991 Court deal very much to the British. That approach failed when Hong Kong's colonial rulers allowed Legco to kill the legislation that would implement the accord, with Legco members who represented or had strong ties to the business community forming part of the majority. Once a second accord was reached, China and its allies undertook more visible and aggressive efforts to claim and to cultivate support from a business community that apparently feared that the C.F.A. accords' restrictions on the Court's jurisdiction and the composition of the bench threatened the

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<sup>544</sup> See Foreign Minister Qian Qichen's News Conference (China Central Television broadcast, Mar. 11, 1996), transcribed in BBC Summary of World Broadcasts, Mar. 11, 1996, available in LEXIS, Asiapc Library, Allasi File (quoting Foreign Minister and Vice Premier Qian Qichen); David Chipp, *China Says No Room for More Talk on Hong Kong Handover*, Reuters, Apr. 29, 1996, available in LEXIS, Asiapc Library, Allasi File.

security of the rule of law and an independent judiciary.<sup>545</sup>

In pushing for acceptance of the second Court deal, China and its Hong Kong allies told the business community that its concerns were simply misplaced. Zhao Jihua, the leader of China's delegation to the Sino-British Joint Liaison Group that crafted the 1995 C.F.A. accord, asserted that the arrangement would assure Hong Kong "an independent and complete judicial system."<sup>546</sup> On this view, a C.F.A. established in conformity with the agreement would be fully consistent with the Basic Law and the Joint Declaration, and the promises made therein that the Hong Kong laws and legal institutions important to business would survive the territory's transition from British colony to Chinese Special Administrative Region. Lu Ping maintained that, despite what the C.F.A. deal's opponents claimed, the accord did not preclude the Court from including more than one judge from the pool of expatriate common-law jurists in whom business seemed to place such trust.<sup>547</sup> China and pro-China sources asserted that the proposed C.F.A.'s jurisdictional limits (including the much-discussed "act of state" exclusion) gave business no reason to fear that commercial disputes involving public entities or Chinese state-owned enterprises would become non-justiciable in Hong Kong courts. Addressing one aspect of this concern, a pro-China Legco member explained that the Basic Law assured that the N.P.C. Standing Committee would consider fully common law practices and standards when it decided whether a case would be within the C.F.A.'s jurisdiction.<sup>548</sup>

Facing again the likely opposition of some generally pro-business members of Legco who had helped to defeat the 1991 bill, and lingering fears in the business community that the 1995 Court deal threatened the rule of law,<sup>549</sup> Chinese officials and spokespersons sought to focus the attention of the territory's business elite on the undesirable consequences for business of

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<sup>545</sup> See Mosher, *supra* note 179, at 13.

<sup>546</sup> Zhao Jihua Speech on Signing of Court of Final Appeal Agreement, WEN WEI PO, June 10, 1995, at A2; cf. *China Hopes Court Deal Will Boost Sino-British Ties*, *supra* note 328 (noting that the cooperation between Britain and China in establishing the C.F.A. should ease cooperation on other transition related issues).

<sup>547</sup> See do Rosario, *supra* note 164, at 26.

<sup>548</sup> See Yeung et al., *supra* note 138, at 1.

<sup>549</sup> See do Rosario, *supra* note 153, at 20; Kwang, *supra* note 477, at 17.

rejecting the 1995 deal. If China and its allies failed to persuade the business community that the proposed C.F.A. would fully satisfy business' wishes for a rule-of-law-supporting Court, the P.R.C. and its friends in Hong Kong still could assert other connections between acceptance of the C.F.A. deal and the tangible interests of the territory's business community. Thus, Lu Ping noted how the protracted wrangling over the Court deal had made the business community nervous about the risk of a "legal vacuum" that would occur if July 1, 1997 passed without a new Court being established.<sup>550</sup> The 1995 C.F.A. legislation offered an easy and early end to that troubling prospect (even though it was no longer possible to set up the Court before the handover).<sup>551</sup> The claim, echoing an argument that had been made on behalf of the 1991 legislation, was that the proposed Court law at least would save the Hong Kong economy from the dangerous uncertainty that would accompany easily revocable, unilateral action by the colonial government to establish a Court, or no action at all.

Accepting the 1995 Court accord and its implementing legislation meant that China at least would not exercise its legislative discretion to establish a new reviewing body that would stand above the C.F.A. and outside Hong Kong, and would surely threaten a more serious departure from the prior judicial and legal system that business found so appealing. As Beijing appears to have assessed the situation, the end of appeals to Britain's Privy Council and the vesting of powers to interpret and amend the Basic Law — and thus to override Hong Kong law — in organs of the central Chinese government might be troubling to business. These concerns, however, were surely less troubling than the same arrangements plus the heretofore undiscussed and more immediately judiciary-displacing mechanism that the Chinese side floated in the 1995 negotiations over the C.F.A.<sup>552</sup> Moreover, in the

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<sup>550</sup> See do Rosario, *supra* note 164, at 26.

<sup>551</sup> See *id.*; see also Zhao Jihua Speech on Signing of Court of Final Appeal Agreement, *supra* note 327, at A2.

<sup>552</sup> In a speech surely welcomed by the China side, Chief Justice and later Chief Executive candidate Sir Ti-liang Yang argued to a business summit that "[p]essimism is our greatest enemy . . . . A sound legal and judicial infrastructure is in place. . . . [W]e have every reason to anticipate the continuation of a legal and judicial system which has served us well." Duncan Hughes, *Protection 'Adequate,'* S. CHINA MORNING POST, Dec. 5, 1995, at 1.

politics of the endgame as China had structured them, the China and pro-China side had made clear to the territory's business community that acquiescing in the Court deal also would lead to more rapid progress on issues of immediate material interest to business, including infrastructure development projects that Hong Kong business circles clearly wanted to see move forward.<sup>553</sup>

On the C.F.A. question, as with rights legislation and democratic reforms for the legislature, the positions that China and its allies in the territory set forth (in this case with considerable support from the Hong Kong government) achieved some of the desired results. Much of the business community expressed relief, although perhaps little more, that the 1995 deal promised to provide badly needed certainty, and, on that basis, strongly supported the 1995 bill's passage.<sup>554</sup> Some, although not all, of the generally pro-business members of Legco voted to approve the legislation. With Hong Kong's economy continuing to thrive and business confidence in the territory's economic future soaring, China and its strongest supporters in the territory seemed to have ample reason to discount the significance of what their adversaries saw as portents of doom, including many prominent Hong Kong companies' registration, relisting, or taking options on office space in jurisdictions where the Privy Council in London would retain ultimate appellate jurisdiction beyond 1997.<sup>555</sup> If such moves by the business community were, as pro-China sources and some

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<sup>553</sup> See *Hong Kong Court*, *supra* note 462, at 19; *Politics of a New Era*, *supra* note 477, at 449-51. Tellingly, a long-standing impasse over the airport deal was resolved in the J.L.G. within three weeks after the 1995 C.F.A. deal. See *id.*

<sup>554</sup> See, e.g., do Rosario, *supra* note 153, at 20 (recognizing that the C.F.A. accord will unfreeze Sino-British relations and restart cooperation on transition matters, such as those relating to business and nationality questions); *Hong Kong Court*, *supra* note 462 (positing that the C.F.A. deal resolves an issue that had been threatening to undermine business confidence during the transition to Chinese rule); Kwang, *supra* note 475, at 17 (noting the business community's support of the deal but desire for the court to begin operation sooner); Michael Steinberger, *Pact on HK's Legal System Has Not Put Fears to Rest*, BUS. TIMES, Aug. 9, 1995, at 8 (noting that the business community's enthusiasm for the Court accord is tempered by concern for the legal system's future); Stephen Vines, *Beijing, London Sign Agreement on HK Court of Final Appeal*, BUS. TIMES, June 10, 1995, at 3 (describing the General Chamber of Commerce and Federation of Industries' belief that the agreement avoids the possibility of a "legal vacuum"); Won & Wong, *supra* note 146, at 3 (noting that the agreement would end the uncertainty surrounding the rule of law).

<sup>555</sup> See, e.g., Steinberger, *supra* note 554 (citing views discounting the significance of shifts in registration and listing sites by Hong Kong companies).



members of the business community claimed, merely "cheap insurance" that firms did not expect to need, or even to be able to use, then there were indeed strong signs that Hong Kong's business community accepted both the substantive terms of the C.F.A. arrangement, and the underlying principle that a P.R.C.-provided institutional arrangement, presented as the product of an exercise of China's positivist sovereignty, could provide a rule of law adequate for the business community. For China and its allies, the implicit claim and hope was that hard-nosed and pragmatic business leaders were not prepared to flee Hong Kong because of minor unpalatable changes in the legal system, or because of a commitment to the abstract legal and political principles that animated Hong Kong liberals' and democrats' arguments about the Court.

### 3.3.4. *Selecting and "Selling" the Chief Executive*

As they had done with respect to the other key legal and institutional issues of the endgame, Chinese officials and their allies in the territory sought to assert and to build support in Hong Kong's business community for their position on issues concerning the selection of the S.A.R.'s first Chief Executive. In this context, however, arguments familiar in substance were presented in forms that were not very elaborate or sustained. With the Chief Executive selection process confined to the last months before reversion and tightly controlled by Chinese authorities and the arrangements mandated by the Basic Law and other N.P.C. enactments, there seemed to be fewer occasions to craft an extended appeal to the business community. China and its allies may also have seen relatively little need for such efforts, given the British authorities' general acceptance of China's positions, Hong Kong liberals' focus on other issues (such as the Provisional Legislature and the fate of the Bill of Rights), and the business community's spontaneous support or cowed compliance on the Chief Executive issue, in the aftermath of the extended battles over the other key issues of the period.

Still, elements of a strategy to find or to fashion support in the business community were visible. To a significant degree, China and its allies appeared to rely on the expectation that much of the business community would welcome one of its own as the first head of the territory's post-reversion government. In the most highly visible manifestation of this assumption, Jiang Zemin

announced to a delegation of Hong Kong business leaders in Beijing early in 1996 that the first Chief Executive should be a businessperson. Jiang presumably chose that generally friendly occasion to articulate that policy because he believed his immediate audience would welcome the statement.<sup>556</sup>

To be sure, not all candidates for the post of Chief Executive drawn from the ranks of business leaders would fare well with the business community. China and its Hong Kong allies recognized the difficulty.<sup>557</sup> They appear to have understood the fear in Hong Kong business circles that, if the job went to one of the territory's top tycoons with business interests concentrated in Hong Kong (or perhaps in the mainland), it might lead to economically disruptive self-dealing on a massive scale, tilting the "level playing field" that the rule of law provided in Hong Kong.<sup>558</sup> To make sure that such concerns were taken into account, or more generally to make the selection process more appealing to the elite business community, China carefully consulted and included Hong Kong business elites in the selection process at several levels. These mechanisms for hearing, reassuring and perhaps winning over business leaders included an informal screening committee run through Xinhua's Hong Kong branch, meetings between members of the central party and government leadership in Beijing and visiting delegations of business leaders from the territory, and a prominent business membership on the Selection Committee that formally nominated the first Chief Executive. At the very least, these arrangements gave business elites a priority not accorded to the territory's more ordinary citizens, and thus special reasons to hope and expect that the person chosen for the office would be someone who understood the wants and needs of the business community concerning the

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<sup>556</sup> See Gilley, *Playing Favourites*, *supra* note 189, at 23.

<sup>557</sup> Maggie Farley, *Tsang Yok-sing on the Role of Democracy, Communism in Chinese Hong Kong*, L.A. TIMES, July 6, 1997, Section M, at 3 (noting D.A.B. leader Tsang Yok-sing's criticism that a business leader serving as Chief Executive would face inevitable conflicts of interest).

<sup>558</sup> Legco member and business executive Henry Tang drew the link explicitly: "Favouritism in business is really a rule-of-law issue. These two things go hand in hand." Gilley, *supra* note 59, at 15; see also Li, *supra* note 485, at 6 (expressing concern regarding a "level playing field" for business if a leading business figure became Chief Executive).

rule of law and other vital issues.<sup>559</sup>

China and pro-China sources further argued that, whatever minor concerns Hong Kong's business community might have about the selection process or its outcome, the business community should welcome the naming of a Chief Executive-designate well in advance of July 1, 1997 because it would advance the interests and preferences of the business community in several ways. They asserted that the early selection of an incumbent for the vital post would reduce uncertainty and, with the promised cooperation of the out-going regime, provide a smoother transition. More specifically, Chinese commentaries stressed the importance of having the Chief Executive-designate appointed in time to participate in the final months of colonial governance, including the preparation of the 1997 budget.<sup>560</sup> As on other key issues of the endgame, here too prominent voices in the business community in the end showed support for China's positions on a potentially controversial issue. The General Chamber of Commerce, for example, asked Patten on the eve of his final policy address to seek prior consultation with the Chief Executive-designate before pursuing new legislation. Business executive and legislator James Tien also urged Patten "to make things easier for the chief executive"<sup>561</sup> by involving him in government immediately.<sup>562</sup>

Tung Chee-hwa's informal, but widely recognized, anointment as the choice for Chief Executive-designate added new dimensions to the P.R.C. and pro-China side's campaign to sell Hong Kong's business community on the Chief Executive selection process and its outcome. Tung possessed several of the qualities that, in the abstract, China and its Hong Kong allies had expected the business

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<sup>559</sup> See Gilley, *Playing Favourites*, *supra* note 189, at 23. P.C. member and prominent businessman Tsing tong Tsui noted the relative lack of attention to popular preferences stating, "Ideally the candidate should also be the most acceptable to the Hong Kong people. But to be honest, I think that will be impossible." *Id.*

<sup>560</sup> See, e.g., Gilley, *Playing Favourites*, *supra* note 189, at 23 (explaining that the P.R.C.'s aim was to appoint a Chief Executive by the time preparation of the 1997 budget got under way); see also Ridding, *supra* note 562, at 2 (noting indications of a rise in investors' confidence in Hong Kong's economy after Tung's selection).

<sup>561</sup> Pritchard, *supra* note 542, at 12.

<sup>562</sup> See Bruce Gilley, *Obstacle Course*, FAR E. ECON. REV., Dec. 19, 1996, at 19.

community to welcome in a Chief Executive. He was a sufficiently prominent figure in business circles to have the respect of the business elites whom he would have to govern — a potentially vital condition to retaining a fair and law-governed business environment. On the other hand, Tung was not a dominant economic figure and his company's income came primarily from overseas shipping rather than from local Hong Kong or mainland investments — traits that would seem to lessen the opportunity and inclination for the self-dealing and favoritism that many business leaders feared. In addition, Tung's experience as a member of Exco suggested an understanding of, and a degree of commitment to, past laws and policies that business favored. Tung's relative silence on the legal-political controversies of the 1990s, despite his Exco membership (with its attendant expectation of a degree of visible support for colonial government policy), suggested that he would not roil the political waters in ways that would strain Hong Kong-Beijing relations and threaten business opportunities. Except for a possible moral debt to Henry Fok (a pro-China businessman who had helped to bail-out Tung's company) and to China (which had helped to fund that rescue), and ties to Li Ka-shing (one of the territory's most powerful magnates) that were close enough to make some business figures uncomfortable, most of the territory's business elite found no compelling grounds to oppose Tung's selection, especially after China's commitment to his appointment became clear.<sup>563</sup>

China and its Hong Kong allies and agents — which on many accounts now included Tung — worked to assure the business community that Tung would preside over a congenial government committed to a legal and institutional order that business would find acceptable. Specifically, they stressed that the S.A.R. government would be an "executive-led" government, with a business leader and former Exco member at the head of the executive branch, a cabinet stocked with leading pro-business figures, and economically sensitive government departments led by hold-overs from the previous business-friendly and rule-of-law-supporting administration.<sup>564</sup> Amid great fanfare from the

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<sup>563</sup> See Ching, *supra* note 483, at 40; Bruce Gilley, *The Great Helmsman*, FAR E. ECON. REV., Dec. 19, 1996, at 18.

<sup>564</sup> See *China Will Not Pressure Hong Kong Civil Servants To Declare Political Stand*, WEN WEI PO, Dec. 29, 1996, at A3, translated in BBC Summary of World Broadcasts, Dec. 31, 1996, available in LEXIS, Asiapc Library, Allasi

territory's pro-China press, China's choice for Chief Executive quickly staked out positions on key legal and policy issues that the business community supported or had come to accept as inevitable. The effusive coverage in the pro-China press stressed comments from Tung that seemed, at best, especially designed to appeal to business, and, at worst, to reiterate positions on controversial legal questions that China and its allies, in other contexts, pressed business to accept: a commitment to prosperity and stability, a pledge of continuity in economic policy, and acceptance of the Provisional Legislature and the roll-back of civil liberties legislation.<sup>565</sup>

Finally, the pro-China press's praise of Tung's stances on rights legislation and the legislature pointed to a less accommodating strand in China's and its Hong Kong allies' message to the business community on the question of the Chief Executive. China was not simply giving business interests preference in an assertedly "democratic" selection process. As pro-China businessman, P.W.C. and P.C. member David Chu noted, China's interests inevitably weighed heavily in the selection of the Chief Executive. The choice had to be someone Beijing knew and trusted. The business community clearly understood this point, as was reflected in the nearly universal perception in Hong Kong that the public moment of Tung's selection came in Tung's January 1996 handshake in Beijing with Jiang Zemin.<sup>566</sup> But comments like David Chu's, Tung's initial post-selection presentation of his future administration's stance on late colonial rights legislation, Tung's prior post as a vice chairman of the Preparatory Committee, and the widely known P.R.C.-orchestrated rescue

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File (quoting Zhang Junsheng, deputy director of Xinhua's Hong Kong office, that the civil service would not be politicized); Ching, *supra* note 483, at 40 (describing Tung's background in Exco); *Text of the Speech by Qian Qichen at the Closing Ceremony of the Plenary Session of the Preliminary Working Committee on June 24, 1995*, WEN WEI PO, June 25, 1995, at A4.

<sup>565</sup> See *Full Text of Questions and Answers at Tung Chee-hwa's News Conference for Chinese, Foreign Reporters in Beijing*, *supra* note 340; Lu Ping *Stresses Partial Abrogation of Some Ordinances Amended by British Hong Kong Government Is Intended To Maintain Hong Kong's Prosperity and Stability*, *supra* note 499, at A11; John Ridding, *Hang Seng Sees Reduction in Risk*, FIN. TIMES, Dec. 28, 1996, at 2; *Tung Chee-hwa Says that Proposals of Legal Subgroup Are Good*, *supra* note 240, at A2.

<sup>566</sup> See Gilley, *Playing Favourites*, *supra* note 189, at 22; *In the Running*, FAR E. ECON. REV., Feb. 8, 1996, at 27.

of his family's shipping company in the 1980s all underscored the obvious point for business: business had to expect and should welcome a figure with ties to Beijing.<sup>567</sup>

This was the same type of argument that Chinese officials and their allies made to the business community in connection with nearly all of the controversial legal and institutional issues that arose during the endgame. Once again, the P.R.C. side held most of the cards and sought to play a hand that would win sufficient support or acquiescence among the business community for China's preferred outcomes, without risking the minimal requisites of China's positivist sovereignty and sovereign discretion with respect to Hong Kong.

#### 4. HONG KONG'S ENDGAME AND THE S.A.R.'S BEGINNING

The battles over "the Hong Kong people" and Hong Kong's business community confirm what the more purely legal-political struggles among the British authorities, the P.R.C. and Hong Kong liberals, democrats and pro-China elements suggested. The main participants' actions and strategies generally were consistent with their pursuit of S.A.R. laws and institutions that reasonably appeared to be both feasible under the circumstances and acceptable in terms of their visions of sovereignty and domestic legality for Hong Kong. Recognizing that they faced an endgame in the generic sense of the approach of Hong Kong's formal transition from British colony to Chinese Special Administrative Region, these key political participants both clung to their core visions, and turned to address legal and institutional issues for which those visions yielded no single, clearly mandatory answer and with respect to which the views of increasingly politicized social constituencies might therefore matter a great deal. Their arguments and approaches to the issues and to these constituencies were also broadly consistent with perceptions that they faced an endgame in any of three more specific senses. While evidence from the pre-reversion struggles over the rule of law, specific laws and institutions, and the views and values of the people and the business sector also appeared to be consistent with the conclusion that Hong Kong in fact primarily faced any of the three versions of an endgame identified in *Endgame I*, developments during the

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<sup>567</sup> See *In the Running*, *supra* note 568.

S.A.R.'s first months suggest that the "end of the game / on-going games" model best fits transitional Hong Kong.

#### 4.1. *Summing Up Hong Kong's Endgame*

The approaches that the key political players took in the struggles to shape concrete laws and institutions for the S.A.R. are, in large part, intelligible as strategies in what the participants could see, reasonably, as an endgame in the "colloquial" sense of a race against the July 1, 1997 deadline to reach feasible deals that were superior to a "no deal" option and that would be binding beyond reversion. For the British and Hong Kong's liberal and pro-democracy politicians, the legal and institutional arrangements they pressed for during the pre-reversion endgame appeared superior to a "no deal" option in the context of a colloquial endgame. From their liberal-democratic and broadly natural law-like perspective, the Bill of Rights and civil liberties laws and democratic reforms to electoral laws were preferable to leaving such issues to be settled by the P.R.C. or the post-reversion S.A.R., provided that such pre-reversion arrangements could constitute, in effect, a deal on which the S.A.R. and the P.R.C. would not renege. Some of their arguments, and perhaps most clearly those less closely tied to core normative principles, made sense as attempts to tap relatively promising deterrents to "reneging" or "roll-backs." For example, efforts to cast the rights laws as necessary to secure conformity with the international human rights norms incorporated in the Joint Declaration and the Basic Law and as consistent with the established roles of Hong Kong's courts and legislature, and efforts to present the Patten reforms as compatible with the Basic Law and the Joint Declaration, seemed crafted to increase the costs of defection for China and the S.A.R. Such arguments sought to make use of the P.R.C.'s and its allies' repeated pledges to Hong Kong and the world that the basic policies set forth in those framework legal documents were sacrosanct.

Splits and shifts within the liberal-democratic camp may be equally comprehensible in terms of a colloquial endgame. For example, while Hong Kong's liberal and pro-democracy politicians apparently understood non-derogable principles of justice and sovereign obligation to require arrangements for the Court of Final Appeal and the Chief Executive that exceeded most feasible compromises, their strong opposition to the Court bills, and their

sustained criticism of the Chief Executive-designate's office as a nascent P.R.C.-surrogate, suggested that they believed pre-reversion "deals" could indeed structure post-reversion reality. Asserting that the same set of liberal-democratic principles could tolerate much more modest arrangements for the C.F.A. and the Chief Executive, the U.K. and colonial Hong Kong governments' arguments for accepting the Sino-British accords on the Court and the Chief Executive selection process and its outcome clearly were premised on a claim that the deals thus struck would bind in a way that unilateral action by Hong Kong's departing masters and doomed legislature would not, and that such deals were therefore worth the concessions the China and pro-China camp exacted. Alternatively, the divisions within the liberal-democratic camp may have been more matters of tactics and assessments of the relative dangers of "holding out" and foregoing worthwhile deals and of "caving in" and accepting too little.<sup>568</sup>

British, colonial government and liberal and pro-democracy politicians' drives to claim and to cultivate popular and business support for their favored positions also make sense as colloquial endgame tactics of mobilizing whatever political forces (or perceptions of potential political pressure) they could deploy to increase the likelihood that the binding deals made at the last

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<sup>568</sup> Patten's later comments that he believed that accepting the act of state provision in the C.F.A. deal was a mistake for Hong Kong arguably suggests that the divisions in the liberal-democratic camp were at most tactical and perhaps not even that, and that some on the British side regarded the U.K. and colonial government position as disingenuous. See Gittings, *supra* note 143, at 10; Danny Gittings, *When Denial Is Deceptive*, S. CHINA MORNING POST, July 13, 1997, at 10. This level of complexity and possible deception still seems exceptional, and should not obscure areas of agreement, such as the British authorities' and liberal and democratic politicians' common distress at the first pre-reversion legislative actions of the Provisional Legislature. See, e.g., Frank Zhang, *China's Assembly for HK Makes First Law-Making Move*, Agence France Presse, Apr. 12, 1997, available in LEXIS, Asiapc Library, Allasi File (quoting Emily Lau's statement that "[t]his is a very, very sad day, a very black day for Hong Kong" and "an act of complete lawlessness," and noting the U.K.'s and Patten's "vow[s] to have nothing to do with" the body). Complexity and fragmentation of another sort, however, should not be discounted in this context. The fact that so many individuals and groups comprised articulate segments of the liberal-democratic camp, and evidence from the authors' interviews with numerous participants in the struggles of Hong Kong's endgame strongly suggest that different actors may have perceived themselves and Hong Kong to be facing different types of endgames. Similar factors support the expectation that the same holds true for the China and pro-China side.



minute would track as closely as possible their notions of legal and institutional arrangements that were both viable in practice and acceptable in principle. If their aim thus was an eleventh-hour, instrumental "blitz" of real or credibly asserted pressure from key social constituencies, the key political participants on the liberal-democratic side acted sensibly when they made an eclectic combination of arguments that appealed to normative first principles and to the material interests and deep-seated fears of the people and the business community. It was equally sensible for them to have eschewed the pursuit of deals that might have been superior to a "no deal" option but that concededly fell short of the asserted minimal requisites of a just and proper legal order, and the ordinary politics of coalition building that was likely to produce such inadequate deals.

The colloquial endgame scenario also provides a plausible interpretation of what the P.R.C. and its Hong Kong allies and surrogates said and did. From the particular positivist perspective of the China and pro-China camp, no principle precluded the China camp's political and legislative commitment to provide arrangements that the British or colonial governments or others in Hong Kong found preferable to a "no deal" option, so long as the terms did not alienate or fatally undermine the P.R.C.'s sovereign discretion. The "deals" on the C.F.A. and on the Chief Executive (principally reflected in the Basic Law provisions governing the selection process and in agreements with colonial authorities to collaborate in a smooth transition) and, arguably, the unilaterally imposed but pre-announced decisions to establish the Provisional Legislature and to revise rights laws, could hold considerable appeal for the China and pro-China camp if such pre-reversion commitments credibly portended post-reversion constraints or their adversaries that substantively similar P.R.C. or S.A.R. actions after July 1 might not provide. That China and its allies pursued such deals and made such pronouncements suggested that they expected that, where the British authorities or Hong Kong leaders agreed (or even where they only acquiesced), these pre-reversion "deals" and decrees could in fact weaken their potential antagonists' post-reversion authority to press for more sweepingly liberal arrangements, principally by denying them the legal and moral high-ground that they might otherwise claim.

Internal divisions and changes of position in the China and pro-China camp on key legal and institutional issues also can be

understood in terms of a colloquial endgame scenario. They may simply have reflected, for example, disagreements (especially between the central leadership and some of Hong Kong's leading pro-China politicians) about how much accommodation of Hong Kong liberal-democratic preferences was prudent, or changing assessments of whether the other side was willing or able to offer much, or to make promises with credible post-reversion effect, in return for new commitments from China.<sup>569</sup>

Chinese officials' and Hong Kong pro-China forces' efforts to assert and to develop support or acquiescence among the people and in the business community for their preferred outcomes are intelligible as an effort to blunt, undercut or counter the "blitz" of pressure from social constituencies that the adherents to a rival vision and agenda sought to deploy in order to affect the course of a possible final flurry of deal-making. If they were seeking to use such pressure to steer colloquial endgame deal-making in a direction that was compatible with their notion of sovereignty and that maximized their preferences for S.A.R. legal and institutional arrangements, members of the P.R.C. and pro-China camp were acting sensibly in using a mixture of appeals to popular and business constituencies' material interests and fears of instability and uncertainty, explanations of the asserted adequacy of P.R.C.-style positivist guarantees, and ultimate insistence on positivist principle wherever it might diverge from popular and business preferences. With the stakes as high and the end of the game as near as the colloquial endgame scenario posits, and with China and reliably pro-P.R.C. Hong Kongers able to impose post-reversion arrangements unilaterally, the pre-reversion turn to potentially persuasive if not strongly vision-based arguments made sense, so long as such arguments did not countenance a compro-

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<sup>569</sup> Tsang Yok-sing's comment that China could have accepted late colonial amendments to civil and political liberties laws, but refused to do so because "the positions of both sides had be[come] so entrenched," suggests one important instance of divergent assessments in the China and pro-China camp. Farley, *supra* note 557, at M3. Similarly, Tsang's willingness to contemplate a fresh round of pre-reversion legislative elections stood in particularly stark contrast to arguments from the pro-China press that the interim body's establishment and pre-reversion legislative work were "necessary measures" and Foreign Minister Qian Qichen's elaborate articulation of the positivist basis for the Provisional Legislature's creation. See, e.g., *Unreasonable Demand Is Justifiably Rejected*, *supra* note 269, at A4; Choy, *supra* note 234, at 1 (quoting Qian Qichen).

mise of the perceived essential requirements of the vision in pursuit of a marginally better but still unacceptable deal.

Many of the arguments and much of the behavior of the central players in pre-reversion Hong Kong's struggles over specific laws and institutions for the S.A.R. also make sense as responses to participants' reasonable perceptions that they faced an endgame in the "technical" sense that the advent of a final round of their reiterative dealings had removed deterrents to "defection" or "cheating" that were vital preconditions to effective deal-making. For the British and for Hong Kong liberals and democrats, it quite plausibly appeared that no reliable, enforceable deals were possible concerning the specific legal and institutional issues at stake during a protracted technical endgame. With the U.K. preparing to cede governmental power over Hong Kong, and the territory's liberal and pro-democracy politicians facing exclusion from the S.A.R. administration and from the legislature for a year or more (during which many crucial decisions concerning S.A.R. laws, institutions and the rule of law were likely), members of the liberal-democratic camp would have few endogenous means for enforcing any bargains struck during the endgame. Britain could expect to have little practical prospect of enforcing P.R.C. pledges as treaty rights under the Joint Declaration. Consigned to the political sidelines, liberal and pro-democracy politicians could expect to have little direct influence in Hong Kong law and policy-making. Understanding that the P.R.C. and the S.A.R. administrations would have much less need for their cooperation or acquiescence in the aftermath of reversion, the British authorities and the pro-democracy Legco block also could anticipate that their potential bargaining partners in a pre-reversion endgame would not be deterred from post-reversion reneging by the prospect that cheating would make the British and Hong Kong liberal and democratic politicians less willing to bargain with them in future rounds.

Moreover, the colonial administration and liberals and democrats in Legco arguably made no real deals with the P.R.C. or its Hong Kong agents, just as the technical endgame model would predict. The Bill of Rights, reforms to other rights laws, and the Patten electoral reforms were adopted without the P.R.C.'s and pro-China Hong Kong elements' cooperation and despite their opposition. The arrangements for the Chief Executive and the C.F.A. deal (once rejected by Legco) can

plausibly be characterized as unilateral P.R.C. impositions in which the Hong Kong and U.K. authorities nominally and incompletely acquiesced, with elements of both arrangements rendered non-negotiable by their entrenchment in the Basic Law that the N.P.C. enacted before the commencement of the endgame.

Divisions in the broadly liberal-democratic camp also appear consistent with its members' understanding that they faced a technical endgame. The British authorities' somewhat greater willingness to compromise and to accommodate Chinese and pro-China demands may have reflected their assessment that getting China and its Hong Kong agents and allies to commit to deals that were unenforceable "within" the terminated game still offered the best hope of bringing political pressure to bear "outside" the game. That is, having secured the C.F.A. deal and, perhaps, some more diffuse P.R.C. and pro-P.R.C. pledges to develop democracy and protect rights in the S.A.R., the British might have anticipated that they would be in a stronger position to hold China and its supporters to account in informal fora of political opinion. Reneging by the P.R.C. and the S.A.R. then would be more than a betrayal of controversial principles of justice and the substantive moral obligations of a good sovereign; it could also harm the P.R.C.'s — and the Hong Kong government's — jealously-guarded reputation for honoring "international" legal commitments. On this reading, that the British did not strike such deals more broadly, and on issues where the Chinese side was more intransigent, merely underscores their commitment to the minimal requirements of a proper legal order, understood in liberal-democratic and natural law-like terms. Alternatively, but equally consistent with a "technical endgame" interpretation, the British may have recognized that they could not wield or mobilize effective pressure after July 1, 1997, and they thus struck some unenforceable deals and eschewed others in a complex pattern that sought to maximize their ability to claim that they both had been true to liberal and democratic values and had achieved a reasonably good deal for their wards in Hong Kong.

In contrast, Hong Kong's most strongly liberal and democratic politicians may have read the options in a technical endgame differently, concluding that ideological purity and a more uncompromising insistence on strongly liberal-democratic outcomes would allow them to claim the moral high-ground and

to make more simple and compelling arguments in the post-reversion era. They might plausibly have concluded that this strategy (and the strict rejection of conventional coalition-building appeals to segments of the major constituencies that it implied) would provide the most promising mechanism for cultivating and mobilizing exogenous political pressure after the end of the technical endgame.

While the "outside the game" or "post-game" political pressure that the British and Hong Kong politicians might hope to deploy after reversion could come in part from themselves and from the international community, social constituencies in Hong Kong were likely a more obvious source. Efforts by members of the broadly liberal-democratic camp to find and to foster support among the territory's people and its business community thus also are comprehensible as responses to the conditions of a technical endgame. British and colonial authorities' and liberal and pro-democracy politicians' resort to arguments that appealed, sometimes crassly, to a wide array of popular and business interests and fears made sense as tactics to construct and to rally social and economic forces that might be able to generate significant political pressure, and to impose substantial economic and political costs, on the P.R.C. or S.A.R governments if they departed too sharply from what a liberal-democratic perspective demanded of a legal and institutional order for post-reversion Hong Kong. On this interpretation, splits between the British and prominent Hong Kong politicians in the battle over these key constituencies reflected different assessments of what was politically possible or different judgments about what their shared vision of law and sovereignty minimally required. For example, the British perhaps regarded efforts to find popular and business support for relatively modest deals or unilateral actions as a way of formalizing standards that were likely to have popular support and that, once formalized and despite their unenforceability as "deals," might help to make up for the lack of enforcement mechanisms. That is, they might become standards that Hong Kong people and businesses would expect and demand that the P.R.C. and the S.A.R. honor. In contrast and equally plausibly, local politicians may have seen such tactics as risking the abandonment of fundamental values in a sweeping accommodation of the sometimes-suspect, and potentially malleable, existing preferences of the people and business elites.

The P.R.C. and its closest supporters in Hong Kong also reasonably could have perceived that they faced a technical endgame and acted and argued in a manner consistent with such circumstances. Chinese and pro-China charges that the colonial government was undertaking unilateral last-minute moves to erode government authority, social order and economic health, that the U.K. was violating earlier bilateral accords on democratization and other matters and seeking insidiously to perpetuate its influence in post-reversion Hong Kong, and that the ranks of liberal and democratic politicians included subversives who were determined to harm Hong Kong, all suggested that the P.R.C. and its allies and agents expected that their potential bargaining partners would defect from any significant deals that might be struck during the endgame. With the British authorities' departure from the territory and the liberals' and democrats' exclusion from the legislature imminent, the P.R.C. and the pro-China camp could plausibly conclude that there was little to deter the U.K. or local politicians from defecting and trying to force reconsideration of supposedly settled issues, and that the liberal-democratic camp had little to offer in return for any concessions or accommodations that the P.R.C. side might be willing to make on the eve of its resumption of the exercise of sovereign prerogatives over Hong Kong.

Further, the P.R.C.'s moves arguably fit the technical endgame pattern of reaching no real deals with the British or with Hong Kong's liberal and democratic leaders. Especially in the view of the P.R.C. and its allies, the excision of portions of the Bill of Rights and other civil liberties laws was ultimately a unilateral action by the P.R.C., effected by the N.P.C. The decision to establish the Provisional Legislature was equally not the result of any "deal." Despite being formally the products of processes in which the U.K., the colonial government and Hong Kong politicians and legislators played some role, the C.F.A. legislation and the Chief Executive selection process and its outcome can be characterized quite credibly as legal and institutional arrangements that the P.R.C., with backing from the territory's pro-China forces, imposed on Hong Kong by means of the enactment of the Basic Law before the endgame and additional unilateral determinations during the endgame.

Signs of splits and shifts in the China and pro-China camp's approaches to the legal and institutional issues of the endgame are

also compatible with the conclusion that the camp's members perceived and faced an endgame in the technical sense. Especially for the pro-China elements in Hong Kong who were relatively sensitive to subtle changes in Hong Kong politics, and the P.R.C. officials who were most familiar with Hong Kong affairs and most directly responsible for them, it was plausible to conclude that a fairly accommodating stance toward laws to protect civil and political liberties, laws providing for democratic elections and the like was (at least at some points in the endgame) a sensible strategy even if it was generally impossible to make enforceable deals embodying those arrangements. Getting the colonial government and prominent Hong Kong politicians to accept such terms publicly (as the British did with the C.F.A. and the Chief Executive), or at least to acquiesce in them before reversion, promised to defuse post-reversion criticism that otherwise might shake confidence in the stability and substance of the S.A.R.'s laws and institutions. On this view, even purely unilateral pre-reversion announcements of relatively moderate and accommodating post-reversion legal and institutional arrangements could constitute pre-commitments that were credible enough to enhance relevant audiences' certainty and confidence in Hong Kong's future. Such moves thus could appear to be prudent exercises of China's sovereign discretion to shape the political landscape of Hong Kong's endgame in favorable ways.

On the other hand, and particularly among central P.R.C. leaders who might be less attuned to the evolving situation in Hong Kong and might be more zealous in asserting sweeping notions of China's sovereign discretion and in emphasizing China's role in Hong Kong's success, adherents to a Chinese-style positivist perspective could have a very different, but equally intelligible, response to the apparent circumstances of a technical endgame. Seeing no prospect of striking deals that could bind the other side or exact significant concessions (especially during the moments of sharpest bilateral conflict), and fearing that unilateral commitments by the China and pro-China side might have little credibility with relevant audiences, members of the China and pro-China camp could believe that there was little point in taking even modest risks of alienating or undercutting sovereign discretion through unenforceable deal-making or reputation-staking unilateral pronouncements.

The approaches that the P.R.C. and its Hong Kong allies took

in the battles over the people and the business community also made sense as technical endgame strategies for pursuing a legal and institutional order that satisfied the minimum requirements of their primarily positivist vision and maximized the achievement of the specific outcomes they sought. In such circumstances, it made sense for official P.R.C. and unofficial pro-China forces to make threats and appeals to social constituencies' immediate material interests and their broader concerns with uncertainty and instability, and to argue that the P.R.C.'s and the S.A.R.'s promised positivist guarantees of rights, democracy and the rule of law were adequate for business and the people and were all that business and the people were going to get. Simply, where no desirable and credible deals were possible, this grab-bag of attempted persuasion and coercion of social constituencies might substitute for enforceable deals. It offered a promising route to cultivating and to mobilizing social forces to provide political support for or acquiescence in legal and institutional arrangements that would be more difficult and costly to defend or impose in their absence, or if China and its allies ceded the field of popular and business opinion to their liberal and democratic antagonists. On this analysis, differences within the pro-China camp over how much to accommodate and how much to reject or disregard these key constituencies' views reflected a familiar and understandable set of disagreements about what a positivist vision of law and sovereignty demanded, about what the business community and the people of Hong Kong required, or about the relative risks and potential benefits of tactics that placed different emphases on those two concerns.

During Hong Kong's endgame, British, P.R.C. and Hong Kong political organizations and leaders also acted and argued in ways that were consistent with a conclusion that they faced the end of one game in a series of on-going games. That is, their approaches also could be understood as responses to a situation in which cheating and defection were less likely than in a technical endgame, deals were less clearly reliable and enforceable than in a colloquial endgame, and players expected to have on-going dealings but while playing changed roles, under altered rules and with differently distributed resources. As the developments examined in the next section of this Article confirm, participants on both sides of the political divide in endgame-era Hong Kong could reasonably expect that the post-reversion period would be



marked by the significant, but incomplete, continuity in actors, roles and issues that characterize the third type of endgame.

As we argued in *Endgame I*, if the major political participants plausibly perceived that they faced an "end of the game / on-going games" type of endgame, patterns of argument and action that would be sensible responses to either of the polar types of endgame would be, almost *a fortiori*, intelligible as responses to the third, intermediate type of endgame. Expecting to play a more limited but continuing role in the aftermath of reversion, Hong Kong liberals and democrats could sensibly pursue semi-enforceable deals on key legal and institutional issues, but they would not be willing to compromise very much because even modest and uncertain reputational concerns could deter them from making broad pre-reversion concessions from which they might find it imperative to defect, and which could thus imperil their claim to the post-reversion moral and legal high-ground. The British authorities could engage in a similar calculus, but their expectation of a sharper decline in their post-reversion influence or their genuinely more modest sense of what a liberal-democratic vision required could be expected to push them, respectively, in the direction of a technical endgame or a colloquial endgame perspective, and toward different answers to the legal and institutional questions of the endgame.

In such circumstances, British and colonial government authorities' and liberal and pro-democracy politicians' approaches to the battles over the people and the business community make sense as strategies to cultivate and accumulate social constituency assets that they could deploy in the endgame to seek favorable and semi-reliable deals and in new "games" to press for the enforcement of old deals and the creation of new ones beyond reversion. Differences in the approaches that members of the broadly liberal-democratic camp took in addressing the people and the business community then could be understood as reflections of divergent assessments of how valuable these "assets" would be and how feasible it was to cultivate and accumulate them.

On the other side, the approaches of the P.R.C. and its Hong Kong stalwarts can be understood in similar terms. This side's broad, but not absolute, unwillingness to strike compromise deals makes sense in the face of the complex factors at play in an endgame of the third type: concern that a failure to perform an endgame deal would make dealings with prior partners in new

games more difficult; perceptions that pre-endgame deals could offer a modestly reliable mechanism for facilitating the establishment of preferred laws and institutions, as well as pose a non-trivial threat to impede the unilateral, post-endgame implementation of such arrangements; and confidence that China and its allies could impose adequate and acceptable legal and institutional solutions after reversion in the absence of an acceptable and enforceable pre-reversion deal.

Shifts and splits within the China and pro-China camp over precisely what agenda to pursue on the concrete legal and institutional questions of the endgame then appear to be the predictable consequences of different assessments of what this complex environment would portend for relatively purist or relatively accommodationist approaches. Finally, in the context of an intermediate endgame, the P.R.C.'s and pro-China elements' sometimes-divergent approaches to claiming and cultivating popular and business support look closely analogous to their liberal-democratic antagonists' asset-cultivation strategy. While one might expect that the shifts in role and power among key political actors would make such social constituency assets less vital to the P.R.C. and its allies than to the U.K. and Hong Kong liberals and democrats, such differences would be ones of degree and not of kind in the context of the ending of one game in a series of changing games among repeat players with potentially variable assets.

In whatever terms the principal political participants understood the pre-reversion endgame, their most prominent leaders made statements at the moment of Hong Kong's reversion that restated long-held visions of sovereignty and legality and continued familiar efforts to claim and cultivate support among the people (in some cases quite explicitly) and among the business community (although often only implicitly or indirectly). In his final speech as governor on June 30, Christopher Patten asserted:

Our own nation's contribution here was to provide the scaffolding that enabled the people of Hong Kong to ascend. The rule of law. Clean and light-handed government. The values of a free society. The beginnings of representative government and democratic accountability. Hong Kong's values are decent values. They are universal values. They are the values of the future in Asia as

elsewhere, a future in which the happiest and the richest communities, and the most confident and the most stable, too, will be those that best combine political liberty and economic freedom as we do today.<sup>570</sup>

Democratic Party Chairman Martin Lee's "July 1 Declaration" made similar, and equally familiar points:

Democracy has taken root and flourished here in Hong Kong. . . . We ask our Chinese rulers to give Hong Kong more democracy, not less, now that we are reunited with our motherland. . . . [T]he Beijing leaders cannot win the trust of the people of Hong Kong by rejecting a legislature elected by Hong Kong citizens . . . ; or by rolling back individual freedoms and our Bill of Rights; or by striking down other laws that have the support of our people. . . . Elections have ensured stability in Hong Kong, they have protected our freedoms and underpinned our economic success. In order to preserve the rule of law, we must not only have an independent judiciary, but good laws. To have good laws, we must have democratic elections to guarantee that our legislature is accountable to us, the people. . . . We believe that people everywhere share our love of freedom and democracy and that these values will ultimately triumph — not only in Hong Kong — but across Asia and the world. . . . Freedom exercised to the full, and guaranteed by the rule of law [are the source of Hong Kong's] lustre and indeed its value to China and the world.<sup>571</sup>

On the other side of the principal divide in the struggles to shape a legal and institutional order for the S.A.R., top P.R.C. officials hewed closely to positivist principle and touched upon their pre-reversion arguments concerning the people and the

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<sup>570</sup> Christopher Patten, Farewell Remarks (July 1, 1997), in Edward A. Gargan, *In a Former Colony, the Dawn Is Red*, INT'L HERALD TRIB., July 1, 1997, at 1.

<sup>571</sup> Martin Lee, The July 1 Declaration (July 1, 1997), in *We Pledge to Be the Voice of the People*, S. CHINA MORNING POST, July 1, 1997, at 17.

business community. After reciting a list of rights and powers that the Basic Law conferred upon Hong Kong and Hong Kongers, Chinese Premier Li Peng declared:

The Basic Law . . . was formulated in accordance with the Constitution of the People's Republic of China and by taking into full account the history and reality of Hong Kong. A democratic system that is consistent with the provisions of the Basic Law and suits Hong Kong's reality will surely enjoy extensive rights and freedom unparalleled during colonial rule. With the return of Hong Kong, the Hong Kong compatriots have become the real masters of the land and they are fully capable of creating an even better future by giving full play to their wisdom and talent.<sup>572</sup>

Sketching some of the details of that future, P.R.C. President and Communist Party chief Jiang Zemin stated that "Hong Kong will gradually develop its own democratic systems that will be suited to itself and will maintain stability according to the Basic Law."<sup>573</sup>

In somewhat more detailed remarks stressing related themes, Xinhua Hong Kong Deputy Director Zhang Junsheng asserted:

Together with the majority of Hong Kong people, we successfully accomplished the preparation and organization of the [S.A.R.], thus finally realizing the smooth transition. The Chinese government's determination and sincerity for firmly carrying out the policies of "one country, two

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<sup>572</sup> Speech by Premier Li Peng at the Reception in Beijing Celebrating the Return of Hong Kong to the Motherland, BEIJING REV., July 14-20, 1997, at 24, 24-25; see also Speech by President Jiang Zemin at the Party Celebrating the Establishment of the Hong Kong Special Administrative Region of the People's Republic of China, BEIJING REV., July 14-20, 1997, at 16, 18; Speech by President Jiang Zemin at the Public Gathering to Celebrate Hong Kong's Return, BEIJING REV., July 14-20, 1997, at 27, 27-30 (providing the text of President Jiang Zemin's speeches making points similar to Li Peng's).

<sup>573</sup> Paul Harrington, *Hong Kong's New Chinese Leaders Get Down to Work on First Day*, Agence France Presse, July 1, 1997, available in LEXIS, Asiapc Library, Allasi File (quoting Jiang Zemin's speech on the occasion of Hong Kong's reversion).

systems," "Hong Kong people governing Hong Kong" and "a high degree of autonomy" were fully reflected in the process of preparing and organizing the [S.A.R.]. The principle of "fairness, openness and impartiality" was implemented and democracy brought into full play in course of setting up the Selection Committee . . . and electing the Provisional Legislat[ure]. . . . The implementation of the Basic Law will surely offer an effective legal guarantee for carrying out the "one country, two systems" policy [because] the Basic Law accurately reflects the general principle of "one country, two systems" and China's specific policies toward Hong Kong[,] . . . has a high legal status . . . [, and is subject to strict] procedures for revising [its provisions].<sup>574</sup>

Comments from a leading pro-China daily in Hong Kong were in the same familiar China and pro-China spirit of positivism and attention to issues relevant to popular and business attitudes and reactions:

The key to ensuring Hong Kong's stable transition lies in implementing the guiding principle determined by Deng Xiaoping and persisting in handling affairs in accordance with the principle and spirit of the Basic Law of the Kong Kong SAR. The key to maintaining Hong Kong's prosperity and stability in the coming fifty years or more lies in persistently implementing the Basic Law to the letter. . . . The Basic Law legalizes the concept of "one country, two systems." It was praised by Deng Xiaoping as a "creative masterpiece." However, all great masterpieces are bound to bring various interpretations. . . . Therefore, it is necessary to formulate various specific rules and regulations in accordance with the principle of the fundamental laws. . . . The Basic Law was enacted in accordance with the guiding principle of respecting history and reality, and its legislative spirit lies in seeking truth from facts. . . . If Hong

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<sup>574</sup> Zhang Junsheng, *Guarantee for Post-1997 Prosperity and Stability in Hong Kong*, BEIJING REV., July 14-20, 1997, at 31, 31-32.

Kong people interpret the [Basic Law in this spirit], they will reach unanimity. . . . This will enable them to jointly implement and defend the Basic Law.<sup>575</sup>

In his first speech as Hong Kong's Chief Executive, Tung Chee-hwa sketched a vision of the S.A.R.'s legal and institutional order in terms that were compatible with China's positivist and sovereignty-protecting vision of legality, that built upon his earlier comments which had been warmly praised in official Chinese and pro-China press commentaries, and that seemed to seek at once to coopt and to rebut liberal-democratic arguments. Tung stated:

Through a solemn act of law, the central people's government has granted Hong Kong a high degree of autonomy, unparalleled anywhere in the world. We value this empowerment, and we will exercise our powers prudently and responsibly. . . .

For the first time in history, we, the people of Hong Kong, will be masters of our own destiny. The [S.A.R.] government is fully committed to preserving the Hong Kong way of life, maintaining Hong Kong's free and open economic system, upholding the Rule of Law, and building a more democratic society. . . .

. . . .

Democracy is the hallmark of a new era for Hong Kong. The [S.A.R.] government will resolutely move forward to a more democratic form of government in accordance with the provisions in the Basic Law. . . . The [S.A.R.] government will adopt an open attitude and be accountable to the public. . . .

. . . [W]e now have the opportunity to chart our own destiny. Under 'one country, two systems,' we will move forward with conviction, prudence and determination. We will work together for a better future.

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<sup>575</sup> *Implement Basic Law in a Practical Way*, TA KUNG PAO, July 14, 1997, at A2 (discussing the Basic Law in the context of the early post-reversion controversy over immigration, and, in part, paraphrasing remarks of Jiang Zemin and N.P.C. Chairman Qiao Shi).

For a long time, Hong Kong has embraced the Eastern and Western cultures. We will continue to encourage diversity in our society, but we must also reaffirm and respect the fine traditional Chinese values. . . .<sup>576</sup>

While such statements suggest that the key established participants in the political struggle over the S.A.R.'s legal and institutional order remained broadly consistent in their principled perspectives and in their social constituency-targeting strategies throughout Hong Kong's endgame, the end of the endgame left a good deal of uncertainty about what kind of endgame Hong Kong had been facing, and about the prospective roles of emergent post-reversion players such as the S.A.R. administration. Post-reversion developments promised, eventually, to dispel some of that uncertainty.

#### 4.2. *The S.A.R.'s Beginning*

Only a few months have passed since Hong Kong's formal return to Chinese rule. It is still too early to reach firm conclusions concerning the law and politics of post-reversion Hong Kong and what they reveal about the nature of transitional Hong Kong's endgame and its implications for the rule of law. Nevertheless, legal and institutional developments since July 1, and debates concerning the propriety and popularity of those developments, suggest a potentially telling mix of continuity and change. Most of the key participants have remained on the scene, but much about the scene they inhabit, and their places in it, is different. The issues of the early post-reversion period in many respects have been the direct descendants of the contentious issues of law and institutions of the pre-reversion endgame, but they have also raised new questions and concerns. The arguments that the principal political players have made in favor of their preferred resolution of those issues, and in addressing the attitudes

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<sup>576</sup> Speech by Chief Executive Tung Chee Hwa at the HKSAR Inauguration and Swearing-In Ceremony, BEIJING REV., July 14-20, 1997, at 15, 15; *A Future of Excellence and Prosperity for All*, BEIJING REV., July 14-20, 1997, at 20, 23 (presenting text of speech by Tung at the party celebrating Hong Kong's reversion); Peter Lim, *Chinese Values Take Over in Hong Kong*, Agence France Presse, July 1, 1997, available in LEXIS, Asiapc Library, Allasi File (quoting Tung).

of the people and the business community, have been broadly consistent with the arguments of the early and middle 1990s, but not identical to them.

#### 4.2.1. *Players and Roles*

All of the major actors in the pre-reversion political struggle to shape Hong Kong's post-reversion laws and institutions have remained on the stage, although their roles and influence have changed considerably and in different ways. Predictably, Great Britain has been pushed to the wings. With the U.K. no longer claiming sovereignty or exercising governmental power over Hong Kong, the formerly prominent British voice in the broadly liberal-democratic camp has been subdued or silent on the details of Hong Kong's legal and institutional affairs since July 1, 1997. Yet, the former colonial ruler has been careful to assert that its final exit is not imminent. Official British statements have consistently insisted that London still has a supporting role to play in securing for Hong Kong the requisites of a just and proper legal and political order.<sup>577</sup> In what critics have taken as a reflection of the U.K.'s new impotence, however, British officials have offered little criticism of the S.A.R. government's controversial moves on election laws and other issues.<sup>578</sup>

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<sup>577</sup> See, e.g., *Hong Kong's New Chinese Leaders Get Down to Work on First Day*, Agence France Presse, July 1, 1997, available in LEXIS, Asiapc Library, Allasi File (quoting Foreign Secretary Robin Cook's statement that "[t]oday is not the end of Britain's long connection with Hong Kong, but a new beginning," and that the U.K. "will walk with [the people of Hong Kong] through the 50 years for which terms of the handover remain in legal force"); *Hong Kong Rebuts Urgings of Former Sovereign*, Agence France Presse, July 31, 1997, available in LEXIS, Asiapc Library, Allasi File (quoting the British government's semi-annual report to Parliament on the implementation of the Joint Declaration, which stated that "[t]he government is determined to protect the cornerstones of Hong Kong's success," including "the rule of law, an independent judiciary, a level playing field, an honest, efficient and politically neutral civil service . . . and the free flow of information"); Chris Yeung, *UK Pledges Help for More than 50 Years*, S. CHINA MORNING POST, Mar. 21, 1997, at 6 (quoting Foreign Secretary Malcolm Rifkind's pledge that "Britain's political and moral commitment to Hong Kong will . . . last . . . beyond the 50 years of the Joint Declaration[s]" pledge to retain Hong Kong's "system" unchanged).

<sup>578</sup> See, e.g., Emily Lau, *Masters Do Not Need to Pull the Strings*, S. CHINA MORNING POST, Aug. 4, 1997, at 18 (criticizing Foreign Minister Derek Fatchett for stating that the freedom accorded demonstrators during the S.A.R.'s first month had given the British government "a great deal of



The P.R.C.'s role has changed as well. In some ways, it has expanded considerably. The departure of the British colonial authorities and the dissolution of a highly critical Legislature have removed key practical impediments to ensuring that the exercise of governmental authority over Hong Kong is acceptable to the P.R.C. In China's view, the coming into force of the Basic Law has established new legal and legitimate avenues for central Chinese authorities to exercise sovereign authority directly. For example, the N.P.C. and its Standing Committee are now formally empowered to revise the Basic Law (after consultation with the Basic Law Committee) and to interpret the Basic Law. Hong Kong's Chief Executive is now formally accountable to the Central People's Government in Beijing (as well as to the S.A.R.), some of its legislature's enactments subject to invalidation by the N.P.C. Standing Committee, and its Court of Final Appeal bound to seek and accept the N.P.C. Standing Committee's interpretations of some key Basic Law provisions.<sup>579</sup> In the first hours of the S.A.R. era, the entry of P.R.C. troops into Hong Kong and the P.R.C.-approved Provisional Legislature's ratification of measures to implement P.R.C.-mandated changes to Hong Kong law provided dramatic symbols of China's expanded role.<sup>580</sup>

On the other hand, China's visible presence in the post-reversion debate over S.A.R. laws and institutions also has shrunk in key respects. Explicit exercises of China's sovereign authority, or even a widespread perception of pervasive informal intervention, on matters that are legally committed to the discretion of the S.A.R. government, or that seem vital to Hong Kong's legal and institutional autonomy, now seem to pose an increased risk of triggering international approbation or a ruinous fall in public and investor confidence in the territory's future. Perhaps reflecting this concern, Chinese official and pro-China statements since July 1 have been especially careful to stress legal and policy restrictions on P.R.C. state organs' meddling in the territory, and the official

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reassurance," and that it was "possible to have open and fair elections" in 1998).

<sup>579</sup> See Basic Law, *supra* note 21, arts. 17, 43, 158, 159.

<sup>580</sup> The principal vehicle for effecting the legislative changes in Hong Kong was the Reunification Ordinance. See, e.g., *Hong Kong Reunification Bill Passed*, New China News Agency, Domest. Serv., July 1, 1997, transcribed in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (describing the Provisional Legislature's unanimous passage of the bill, at 3:55 a.m. on July 1, to ratify thirteen bills it had approved prior to July 1, 1997).

and staunchly pro-China press has confined itself ever more narrowly to praising the accomplishments of Tung Chee-hwa's government.<sup>581</sup>

Within Hong Kong, changes of role have been complex. Democratic Party and liberal independent politicians and activists remain a formidable force, leading public rallies critical of the government, making now-familiar arguments about the requisites of democracy and the rule of law, and planning their campaigns for the 1998 elections for the S.A.R. Legislature. On the other hand, they have lost their former power and platform as the largest block in an assertive legislature. No longer able to focus primarily on the relatively easy targets of a foreign and insufficiently liberal and democratic colonial government, or an ideologically alien and resolutely illiberal group of P.R.C. authorities, these critics have had increasingly to turn their fire to the far more ambiguous target of a fairly popular Hong Kong Chinese-led S.A.R. administration, and to signs of relatively subtle P.R.C. influence on that administration.<sup>582</sup>

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<sup>581</sup> See, e.g., John Ridding, *Hong Kong's Solid Start*, FIN. TIMES (London), Sept. 8, 1997, at 22 (noting held-over government officials' praise of Ma Yuzhen, the P.R.C. Foreign Ministry Representative in Hong Kong, for his low-key and cooperative role, and quoting new Hong Kong and Macao Affairs Office Director Liao Hui's description of himself as a "goalkeeper" who protects Hong Kong from mainland interference); *Speech by President Jiang Zemin at the Party Celebrating the Establishment of the Hong Kong Special Administrative Region of the People's Republic of China*, translated in BEIJING REV., July 14-20, 1997, at 16, 17 (setting forth President Jiang Zemin's pledge that "no central departments of localities [of the P.R.C.] shall interfere or be allowed to interfere in the affairs administered by the S.A.R. in accordance with the Basic Law"); Tsang Yok-sing, *Uncertain Role for Lu Ping's Old Office*, S. CHINA MORNING POST, Sept. 2, 1997, at 18 (expressing expectation that Liao Hui would abandon pre-reversion practice of Hong Kong and Macao Affairs Office Director making "authoritative remarks about SAR affairs"); cf. Jonathan Braude, *It's Time for a Little Trust, Says Martin Lee*, S. CHINA MORNING POST, Aug. 3, 1997, at 11 (noting Martin Lee's expression of surprise at the silence of Beijing and the Hong Kong Xinhua branch during the first months of the S.A.R.).

<sup>582</sup> See Chris Yeung, *Chinese Rule Okay So Far, Says Martin Lee*, S. CHINA MORNING POST, Sept. 6, 1997, at 6 (noting Martin Lee's mild comments about S.A.R. governance so far, and expressions of concern that Hong Kong's new dictatorship may stop being so benign); Braude, *supra* note 581, at 11 (noting similar comments from Martin Lee and quoting Lee's view that the advent of the S.A.R. "at least has localized the fights" over Hong Kong's future and made them an intra-Hong Kong affair); Linda Choy, *Tung's Political Say Limited, Says Szeto Wah*, S. CHINA MORNING POST, Aug. 18, 1997, at 4 (noting leading Democrat Szeto's view that Tung likely had to toe China's line on any

"Pro-China" forces in the territory have similarly remained important players while facing significant changes of role and context. Most notably, the D.A.B.'s representation in the Provisional Legislature and its expected share of the Legislature to be chosen in 1998 significantly exceed its small contingent in the last colonial Legco. Yet, the return of Hong Kong to China has not been an unmitigated boon for the territory's pre-eminent pro-China party. The D.A.B. received a strikingly small share of the seats on the pro-China Provisional Legislature, has sometimes been on the losing side of key post-reversion votes in that body, and has been largely excluded from a big business-dominated executive branch in the S.A.R.'s executive-led government.<sup>583</sup>

Finally, "pro-business" politicians' roles seem to have changed substantially in the wake of Hong Kong's handover. In the pre-reversion endgame, they had been Legco's swing vote without a clearly developed legal and institutional vision, or the conduits for the business community's considerable influence with the colonial government, or the most visible barometers of the attitudes of a key constituency over which the more assertive players in the public politics of pre-reversion Hong Kong fought. In the post-reversion period, many of them — including Tung Chee-hwa — have occupied the top positions of the executive-led government, as well as a significant share of the seats in the Provisional Legislature. Perhaps inevitably, their accession to these influential offices has coincided with new pressures to articulate a legal and political vision for Hong Kong. For Tung and many of those around him, the vision that began to take shape before reversion,

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"political question"); Andy Ho, *End of the Honeymoon*, S. CHINA MORNING POST, July 15, 1997, at 21 (noting that liberals' expulsion from the legislature shifted their focus to "protests outside the institution" and efforts "to amplify public grievances and discontent in the run-up" to 1998 elections).

<sup>583</sup> See do Rosario, *Stand Up and Be Counted*, *supra* note 106, at 17 (reporting that D.A.B. won six of sixty seats in the 1995 Legco elections); Bruce Gilley, *Men Who Matter*, FAR E. ECON. REV., Apr. 3, 1997, at 20 (describing the dominance of business elites on the Executive Council and in senior policy posts, and the ground D.A.B. lost to less docile pro-China parties in appointments to the Provisional Legislature); Chris Yeung, *Keeping a Tight Rein on Legco*, S. CHINA MORNING POST, July 12, 1997, at 15 (describing one academic's argument that the plan for S.A.R. governance was to limit the influence of both D.A.B. and the Democratic Party in an effort to enhance the power and discretion of the Chief Executive, and quoting D.A.B. leader Ma Lik's statement that D.A.B. would be happy to retain the ten seats it had in the Provisional Legislature in the 1998 legislative elections).

and that has emerged more fully since, is one that looks rather like a Singapore model. Compared to pre-reversion Hong Kong, the S.A.R. order that pro-business political leaders seem to envision has a more extensive industrial policy, a greater government role in housing and other sectors, and weaker protection of civil liberties (often justified as appropriate to ensure the protection of social order and harmony with local cultural values).<sup>584</sup>

#### 4.2.2. *Issues and Conflicts*

Established participants' new or altered roles in post-reversion Hong Kong have begun to take shape in the context of controversies over general rule-of-law concerns, and specific legal and institutional questions, during the S.A.R.'s first months. Like the participants themselves, the issues with which they have wrestled, so far, appear to exhibit a mixture of continuity and contrast with those of Hong Kong's pre-reversion endgame. The key political players' arguments about those issues seem to reflect a broad continuation — although with possibly significant alteration — of the pre-reversion endgame's patterns of a basic clash of visions of domestic legal-political authority, substantial intramural disagreements among adherents to each vision over specific legal and institutional arrangements, and a focus on how key social constituencies might line up in the political battles over laws and institutions for the Hong Kong S.A.R.

Strong assurances that Hong Kong's post-reversion rulers understand the importance to Hong Kong of the rule of law, and especially the rule of law for the economy, remain the order of the day in official Hong Kong circles. Anson Chan, continuing in her post as Hong Kong's top civil servant, has spoken of the rule of law in terms that generally echo those of top officials in the colonial government, describing it as "central to Hong Kong's

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<sup>584</sup> See *A Future of Excellence and Prosperity for All — Speech by Tung Chee Hwa, First Chief Executive of the HKSAR, at the Celebration Party*, reprinted in BEIJING REV., July 14-20, 1997, at 12-23 (briefly setting forth Tung's agenda for the S.A.R. government's policies and legislative program); *supra* note 576 and accompanying text (discussing Tung's Asian values theme); see also deLisle & Lane, *supra* note 22, at 35-36, 60-62, 67-68 (discussing a "Singapore model" of the rule of law for Hong Kong); Chris Yeung, *A Trade-Off with the Rule of Law*, S. CHINA MORNING POST, July 19, 1997, at 17 (quoting pro-China academic and former P.C. member Lau Siu-kai's analysis of the Tung administration's agenda as favoring business, and not the middle and upper-middle classes or the poor).

economic and social success," and a top priority of the S.A.R. administration "from the Chief Executive downwards," "inextricably linked to our democratic institutions," and a vital asset which "must be protected and preserved by all of us."<sup>585</sup> In the same vein, Tung Chee-hwa has commented that the "rule of law underpins our free market, the work of our civil service and the quality of our community" and "must be preserved by all means."<sup>586</sup>

Despite such signs of continuity in the "Hong Kong government" position, shifts in context and emphasis suggest that the S.A.R. government officials' primary conception of the rule of law departs from the liberal-democratic one endorsed by the colonial authorities. It appears to have some of the features of the rule of law that China and its Hong Kong allies appear to have endorsed during the initial S.A.R. era, and that they strongly supported during the pre-reversion endgame. The democratic institutions to which Chan linked Hong Kong's post-reversion rule of law are less sweepingly democratic than the ones Patten and pro-democracy politicians envisioned in the early and middle 1990s. Indeed, they approach the model the P.R.C. favored during the same period. Chief Executive Tung's account of an adequate rule of law, like that found in contemporary P.R.C. sources, often has seemed narrowly economic and business-focused.<sup>587</sup> Moreover,

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<sup>585</sup> *Anson Chan in USA Defends Electoral Changes, Rule of Law*, Hong Kong SAR web site, Sept. 15, 1997, transcribed in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (quoting Anson Chan); *Elections Called Stepping Stone to Universal Vote*, New China News Agency, Sept. 15, 1997, transcribed in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library Allasi File (quoting Anson Chan).

<sup>586</sup> *Chief Executive in USA Defends Electoral Changes as Move Towards More Democracy*, Hong Kong SAR web site, Sept. 10, 1997, transcribed in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (quoting Tung Chee-hwa); Linda Choy, *Tung Pledge on Law*, S. CHINA MORNING POST, Aug. 1, 1997, at 1 (quoting Tung).

<sup>587</sup> See *Anson Chan in USA Defends Electoral Changes, Rule of Law*, *supra* note 585 (presenting Anson Chan's account of democratic elections for post-reversion S.A.R. legislatures); *Chief Executive in USA Defends Electoral Changes as Move Towards More Democracy*, *supra* note 586 (presenting Tung Chee-hwa's comments drawing a connection between Hong Kong's rule of law and its financial autonomy and free market); Li Shangzhi, Zhao Wei & Wu Ming, *Hong Kong Will Be Even Better Tomorrow*, New China News Agency, July 2, 1997, translated in BBC, Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (presenting official P.R.C. commentary stressing the economic benefits provided by Hong Kong's "relatively complete legal and

S.A.R. officials' and pro-China sources' explanations of the guarantees of the rule of law's survival typically have placed heavy emphasis on the positivist guarantees provided by the Basic Law and other P.R.C. legal commitments, and the P.R.C. interests and practices that support those commitments — all features central to pre-reversion P.R.C. and pro-China arguments.<sup>588</sup>

Liberal and pro-democracy politicians seem to have continued to adhere to their pre-reversion vision of the rule of law, including their view that an adequate rule of law must be grounded in robust democratic institutions. Britain has at times offered muted support for their positions. The explicit foci of liberal-democratic concerns, however, have changed somewhat since the establishment of the S.A.R. While liberals and democrats still have seen the P.R.C.'s meddling and the Provisional Legislature's existence and activities as significant threats to the rule of law and its democratic underpinnings, their post-reversion comments have placed unprecedented emphasis on the dangers of an executive-dominated government. Leading former Legco members have expressed their worries that the rule of law will degenerate into rule by law, or lawless personal rule. Several of them have argued that this unraveling of legality is likely to take place through the specific mechanism of the emergence of a government in which the legislature and the courts are the docile agents of an overween-

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supervision systems and adequate protection for economic activities").

<sup>588</sup> See *Chief Executive in USA Defends Electoral Changes as Move Towards More Democracy*, *supra* note 586 (presenting Tung Chee-hwa's comments asserting that the 'one country, two systems' approach was "China's idea" and "deeply in China's interest"); *Hong Kong Rebuts Urgings of Former Sovereign*, *supra* note 577 (quoting Tung Chee-hwa's assertion that the S.A.R. government and the Central People's Government were both committed to implementing fully the legal guarantees of Hong Kong's autonomy and to preserving the rule of law); Ridding, *supra* note 581, at 22 (quoting Financial Secretary Donald Tsang's comment that China has not interfered with or exerted pressure on him); *Safeguard the Authority of the Basic Law*, TA KUNG PAO, July 5, 1997, at A2 (describing the Basic Law as a "constitutional document" for Hong Kong which "embodies China's state will," "expresses China's state needs" and "stipulates that the central government will implement the basic principles of 'one country, two systems' and 'Hong Kong people ruling Hong Kong'"); Tsang, *supra* note 581, at 18 (presenting D.A.B. leader's assertion that the Basic Law "clearly defines the few areas . . . which are outside Hong Kong's autonomy" and with respect to which "the Central Government can take decisions").

ing Chief Executive, with the legislature willing to pass any legislation (including laws with retroactive effect) favored by the Chief Executive or China, and the courts willing (or required) to leave the protection of citizens' basic rights to the discretion of the executive.<sup>589</sup>

In the general debates over the rule of law during the opening months of the S.A.R. era, battles over the attitudes and allegiances of the people and the business community appear to have continued as well. In asserting that the rule of law is alive and well, and in arguing that business and popular confidence in the new regime is high, Tung and other S.A.R. sources have extended a pre-reversion strategy of claiming and cultivating support from these key sectors for the version of the rule of law that the S.A.R. government and the P.R.C. are establishing for Hong Kong. On the other side, prominent liberal and pro-democracy political leaders have continued to seek popular and business community backing for more critical and skeptical perspectives on the rule of law that the S.A.R. has promised or seems likely to provide. At a general level, they have argued that there are still reasons for the people to be concerned about the longer term prospects for the rule of law, and that it is still too early to tell whether Hong Kong's business community will enjoy business as usual.<sup>590</sup>

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<sup>589</sup> See Braude, *supra* note 581, at 11 (quoting Martin Lee's comments that he is "still worried about the rule of law" and that some of his pre-reversion "fears [about the fate of the rule of law] have materialized"); Lau, *supra* note 578, at 18 (charging that the S.A.R. government had been "high-handed" in its handling of key legal issues, and had engaged in "excesses" that the Provisional Legislature that the courts proved "incapable of checking"); Margaret Ng, *Executive's Cloak of Legality*, S. CHINA MORNING POST, Aug. 22, 1997, at 19 (presenting pro-democracy former Legco member's charge that the executive is "using the legislative process to give its bare will the cloak of legality," and that this development marks the "beginning of the rule by law, supplanting the rule of law," portends new barriers to judicial redress, and signals a new and dangerous dependence on the benevolence and generosity of the S.A.R. executive, which "must not be confused with the protection of rights"); Margaret Ng, *Setting a Precedent in Retrospect*, S. CHINA MORNING POST, June 27, 1997, at 23 (presenting pro-democracy former Legco member's eve-of-reversion denunciation of the S.A.R. government for having "no respect for the rule of law" and the legislature, as was reflected in the government's "assum[p]tion] that what the executive pronounces is already law or as good as law").

<sup>590</sup> See, e.g., Braude, *supra* note 581, at 11 (noting Martin Lee's belief that people are "more aware of their freedom" than before and thus perhaps more likely to defend it against the significant threats to that freedom and the rule of law in the S.A.R.); *Chief Executive in USA Defends Electoral Changes as Move Towards More Democracy*, *supra* note 586 (presenting Tung Chee-hwa's remarks

Liberals and democrats also have articulated more specific arguments about the prospects for the rule of law in post-reversion Hong Kong, and about the views of the people and the business community, in the context of controversies over more concrete laws and institutions that have marked the first months of the S.A.R. era. S.A.R. government officials, Hong Kong's pro-China circles, and, occasionally, Britain and China have done much the same. The issues that have been the foci of their conflicts have been closely connected, but not identical, to the four principal legal and institutional questions of the pre-reversion endgame.

#### 4.2.2.1. *Laws Governing Rights and Civil Liberties*

Laws regulating civil liberties, political activities and other rights of Hong Kong residents have remained a focus of conflict in the S.A.R.'s first months. Most controversially, the Reunification Ordinance enacted legislation, which the Provisional Legislature had approved before July 1, to reverse late colonial reforms to the Public Order and Societies Ordinances and other rights-related laws. The new legislation restored some pre-reform provisions and authorized restrictions on expressive and associational freedoms when government officials determined that an action or organization posed a danger to "national security" — a term that the government construed broadly with respect to public demonstrations in a set of administrative guidelines that it issued during its first weeks in office.<sup>591</sup>

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asserting high levels of confidence, and reasons for that confidence, in the business community, and citing polling data indicating a 78% popular confidence rating); Karen Lowe, *Hong Kong Democracy Activist Derides Tung Chee-hwa's Election Law*, Agence France Presse, Sept. 12, 1997, available in LEXIS, Asiapc Library, Allasi File (describing Emily Lau's view that it was still too early if business would continue as usual in Hong Kong, given the prospect of rising corruption and political repression).

<sup>591</sup> See, e.g., *Hong Kong S.A.R. Government Issues Administrative Guidelines on 'National Security'*, TA KUNG PAO, July 19, 1997, at A2 (describing the S.A.R. government's guidelines interpreting "national security" exception in Public Order Ordinance as permitting bans on demonstrations that are likely to disrupt public order or immediately harm social stability, or that advocate splitting the P.R.C., including by granting independence to Taiwan or Tibet); *Priority Task for S.A.R. Is to Make a Success of its Work*, TA KUNG PAO, June 16, 1997, at A2 (describing the Provisional Legislature's pre-reversion approval of amendments to the Societies and Public Order Ordinances); *Provisional Legislature Hears Readings of Societies Bill*, New China News Agency, May 17,



While Hong Kong's colonial government had sharply denounced plans to reverse and revise terminal colonial laws governing civil liberties and political rights, the S.A.R. government has defended the changes, with reliable support from the pro-China press but with very little public commentary from official P.R.C. sources. Their arguments generally have been followed the China and pro-China camp's approach to the Bill of Rights and related issues during the final years before reversion. S.A.R. officials and unofficial pro-China commentaries have argued for the validity of the post-reversion rules on rights primarily in positivist terms: The Provisional Legislature, which P.R.C. and pro-China sources have long claimed to be a legitimate law-making body, duly enacted the new laws by passing the Reunification Ordinance. On this view, the Provisional Legislature's pre-reversion consideration and approval of the rights legislation was necessary because the bills otherwise would not have been ready for enactment by means of the Reunification Ordinance. Absent such action by the Provisional Legislature, a dreaded "legal vacuum" would have occurred when the Basic Law came into effect as Hong Kong's local constitution and provisions of the Public Order and Societies Ordinances and other colonial-era rights laws, which the N.P.C. Standing Committee had declared to be incompatible with the Basic Law and not to be adopted as S.A.R. law, ceased to be law in Hong Kong. (On this view, the Basic Law itself has remained the principal, and fully adequate, positivist guarantee of Hong Kongers' civil and political

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1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (describing amendments to the Societies Ordinance that would permit registration officers to deny an organization's request for registration or exemption from registration where necessary in the interests of national security, public safety, public order, protection of the rights of others, or because of applicant's connections with a foreign political organization); *Provisional Legislature Studies Public Order Bill*, New China News Agency, May 17, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (describing amendments to the Public Order Ordinance that would authorize prohibition of public demonstration where necessary in the interests of national security, public safety, public order, or protection of the rights or others); *Xinhua Comments on Need for Provisional Legislative Council*, New China News Agency, June 30, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (listing the thirteen bills, including amendments to the Societies and Public Order Ordinances, examined by the Provisional Legislature before reversion and slated for enactment into S.A.R. law by the Reunification Ordinance).

rights.) S.A.R. officials also argued for the national security guidelines in similarly positivist terms, as proper administrative interpretations of the new legislation that did not, and in principle could not, expand the grounds for restricting liberties beyond those provided in the revised Public Order Ordinance.<sup>592</sup>

These claims about the validity of the new laws and administrative guidelines doubtless have aimed, in part, at assuaging concerns among the people and in the business community that legal rights they valued were facing a broader erosion. Other arguments from Hong Kong officials and established pro-China elements (with occasional backing from official P.R.C. sources) have more obviously sought to develop or assert popular or business support. Paralleling arguments familiar from pre-reversion conflicts, they have asserted that the adoption of the new rights laws followed an adequate process of consultation with the Hong Kong people (including, presumably, the especially heavily consulted business community), and that the new laws enjoyed genuine support in Hong Kong (except from those who had been duped by the British or who still carried excessive fears

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<sup>592</sup> See, e.g., *Martin Lee Humbles Himself in the United States*, TA KUNG PAO, Apr. 17, 1997, at A4 (arguing that imposing statutory "state security" limitations on political freedoms is within the discretionary power, and consistent with common practices, of sovereign states); No Kwai-yan, *Amendments to Changes in Rights Laws to be Accepted*, S. CHINA MORNING POST, May 18, 1997, at 2 (describing defense of Provisional Legislature's pre-reversion action by Hong Kong colonial government official seconded to the S.A.R. administration-in-waiting); Elsie Leung Oi-sie, *Freedom of Speech Alive and Well*, S. CHINA MORNING POST, Aug. 19, 1997, at 21 (presenting argument by S.A.R. Secretary for Justice that the national security guidelines "did not, and could not, give the police greater power than that set out in the Public Order Ordinance"); *Rational Balance Between Personal Rights and the Public Interest*, WEN WEI PO, Apr. 10, 1997, at A4 (describing the N.P.C. Standing Committee decision to reject late colonial amendments to Societies and Public Order Ordinances as in accordance with article 160 of the Basic Law, and asserting that the Provisional Legislature's pre-reversion consideration of new legislation on the same matters was necessary to prevent a legislative vacuum); *Reaching Common Understanding Through Consultation*, WEN WEI PO, May 2, 1997, at A2 (citing, in discussion of revisions to the Public Order and Securities Ordinances, the Basic Law as the key guarantee of civil liberties and social order in Hong Kong); Jonathan Sprague, *Future HK Government Blasted Over Freedom Curbs*, Reuters, Apr. 10, 1997 (describing "legal vacuum" argument made by a source in Tung Chee-hwa's office); Tsang Yok-sing, *Basis for a Curb on Political Affiliations*, S. CHINA MORNING POST, Apr. 15, 1997, at 20 (presenting D.A.B. leader's version of the "legal vacuum" argument).

rooted in the Tiananmen Incident).<sup>593</sup> According to S.A.R., P.R.C. and pro-China commentary, the new laws governing political liberties are suited to the needs and distinct values of Hong Kong people, reflect a proper balance between social and individual interests, and stand as a bulwark against social instability and foreign influences that might threaten state security — much as Tung, China and pro-China sources had argued in debates over rights laws during the pre-reversion endgame.<sup>594</sup>

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<sup>593</sup> See, e.g., *HKSAR to Preserve People's Freedom: Tung Chee-hwa*, New China News Agency, Apr. 16, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (quoting favorably Tung's statement, "I hope the consultative exercise will bring our community together to reach a broad consensus"); C.K. Lau, *Hollowness in Mr. Tung's Words*, S. CHINA MORNING POST, June 5, 1997, at 19 (describing Tung's call on Hong Kong people to "put down the 'June 4 baggage'"); Li Huailin, *HK People Support Amendment Proposals*, New China News Agency, Apr. 28, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (asserting that "many local associations have issued statements . . . to express support" for the proposed amendments to rights laws); *Martin Lee Humbles Himself*, supra note 592, at A4 ("In the view of most people, the direction and principles of the amendment proposals are correct."); No, supra note 592, at 2 (reporting future S.A.R. official's description of the proposed amendments to rights laws as "the fruits of consultation" that "had already taken into account public opinion"); *Rational Balance Between Personal Rights and the Public Interest*, supra note 592, at A4 (praising the Chief Executive-designate's decision to pursue "broad consultation" with the public in crafting legislation to amend the Public Order and Societies Ordinances as indicating "importance" of "public opinion" to the S.A.R. government and as assuring that the amendments "will have a solid foundation in public opinion"); *Reaching Common Understanding Through Consultation*, supra note 592, at A2 (criticizing colonial authorities and Hong Kong democrats for making misguided and alarmist claims that the proposed reforms would significantly diminish Hong Kongers' rights); *Successful Consultation on Revision of Ordinances*, TA KUNG PAO, Apr. 30, 1997, at A2 (asserting that the "majority of inhabitants" had participated in the consultation process and "expressed their support," and "realized the need" for the amendments to rights laws).

<sup>594</sup> See, e.g., Silvia Cavallini, *Hong Kong Clarifies Law on Banning of Protests*, L.A. TIMES, July 19, 1997, at A3 (describing comments from a senior S.A.R. official that rights amendments were necessary because Hong Kong was small, open and therefore "vulnerable to external forces"); *New Changes Proposed to Two Hong Kong Ordinances*, New China News Agency, May 15, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (describing the "three fundamental principles" underlying proposed revisions to Public Order and Societies Ordinances as striking "a proper balance between civil liberties and social order," upholding the Basic Law and the application of the principal U.N. human rights covenants, and guarding against "interference by foreign political forces"); *Successful Consultation on Revision of Ordinances*, supra note 593, at A2 (asserting that the Hong Kong people "are not willing to see Hong Kong become a political city in noisy

Moreover, S.A.R. officials have frequently asserted, and P.R.C. and pro-China sources have reported, that the new laws have not changed prior policy or practice. Post-reversion events, they have argued, have made clear that there was no reason for the people to fear that their right to demonstrate would be curtailed, or for the business community to worry that disorderly protests might follow the moves to alter the rights laws.<sup>595</sup>

Reflecting a similar pattern of broad continuity with the pre-reversion era, prominent adherents to a liberal-democratic perspective have attacked the S.A.R.'s new rights laws and regulations, largely on the natural law-like grounds that the new legislation is incompatible with obligatory substantive norms. Emily Lau, Martin Lee, and Margaret Ng, respectively, denounced the new laws as a threat to "important universal values" of "civil and political rights," "a step backward for freedom" and basic rights, and a reflection of wilful blindness to the importance of criticism in an open society.<sup>596</sup> While British colonial authorities joined in the liberal chorus of condemnation and concern when the specific plans for post-reversion changes to rights laws became clear during the final months before the handover, U.K. responses to the S.A.R.'s enactment of the new laws have been much more restrained. While continuing to criticize the retrenchments, British statements have also sounded cautiously optimistic that the S.A.R. will provide adequate protection for civil and political rights that her majesty's government still officially views as essential for a good and adequate order in Hong Kong.<sup>597</sup>

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disorder" and support changes to rights laws to prevent such developments).

<sup>595</sup> See, e.g., *Anson Chan in USA Defends Electoral Changes, Rule of Law*, *supra* note 585 (presenting chief civil servant Anson Chan's statement that "Hong Kong people continue to demonstrate, disagree, debate and argue" and that, "since the handover, there have been some 150 demonstrations, and not a single arrest"); Ridging, *supra* note 581 (quoting Financial Secretary Donald Tsang's statement, "We have an average of 20 demonstrations a week"); *No Policy Change Towards Demonstrations*, New China News Agency, Oct. 4, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (quoting S.A.R. official's statement, "Peaceful demonstrations have remained pretty much a way of life after 1st July").

<sup>596</sup> Lowe, *supra* note 590 (quoting Emily Lau); Liz Sly, *Laws Ok'd to Restrict Hong Kong Freedoms*, CHICAGO TRIB., June 15, 1997, at 4 (quoting Martin Lee); Ng, *supra* note 589, at 19.

<sup>597</sup> Compare Edward A. Gargan, *Hong Kong Residents Protest China's Plans to Limit Civil Rights*, N.Y. TIMES, Apr. 11, 1997, at A15 (quoting colonial government statement that "the existing provisions of the Societies Ordinance

In the debates over rights laws after the handover, Hong Kong liberals and democrats have also continued to address the attitudes of the people and the business sector, and to rebut their adversaries' arguments about popular and business views. Democratic Party leaders and other liberals, with some initial support from the departing colonial authorities, denounced popular consultation on proposed rights legislation as "a fake." They have derided the new laws as regressive, "chilling," and likely to allow the state to take away the rights of the people through manipulation of the national security provisions and other tactics.<sup>598</sup> These critics conceded that perhaps little had happened in the S.A.R.'s first weeks, especially in areas of immediate concern to the business community. Nonetheless, they have insisted, the threat is real. As liberals and democrats have seen it, the national security provisions hang like a sword of Damocles over the heads of

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and the Public Order Ordinance do not call for any changes"), and Li Hsuan-chu, *Legislative Revision Consultation has Profound and Far-Reaching Significance*, WEN WEI PO, Apr. 18, 1997, at A16 (criticizing Patten for asserting that planned revisions would deprive Hong Kong people of their liberty), with Lau, *supra* note 578, at 18 (noting U.K. Foreign Minister's view that first month of S.A.R. was reassuring because demonstrations were allowed to occur), and Quinton Chan, *Repeal "Won't Hurt Rights,"* S. CHINA MORNING POST, July 5, 1997, at 6 (describing U.K. report to U.N. Human Rights Committee declaring that S.A.R. amendments to the Bill of Rights Ordinance would not have significant legal implications, but that amendments to laws on civil liberties were "unnecessary and unjustifiable").

<sup>598</sup> Many of these arguments emerged in connection with the Provisional Legislature's pre-reversion consideration of the proposed legislation that the Reunification Ordinance was to enact. See, e.g., Sharon Cheung & No Kwai-yan, *Tung's Consultation Fake, Say Democrats*, S. CHINA MORNING POST, Apr. 19, 1997, at 6 (quoting Democratic Party vice chairman's statement that consultation was "a fake" because senior Exco members declared that key principles in the proposed bills were not open to change); Linda Choy & Chris Yeung, *Bar Chairman Warning on Defining New Laws*, S. CHINA MORNING POST, Apr. 23, 1997, at 6 (quoting Bar Association chairperson's concern about consequences of Chief Executive's failure to offer clear definition of "national security"); Li, *supra* note 597, at A16 (noting Patten's accusations that there was not a "true consultation"); Margaret Ng, *Threat to Our Civil Rights*, S. CHINA MORNING POST, Apr. 11, 1997, at 23 (presenting former Legco member's view that the proposed rights legislation is a "reversal" of the policy of liberalization and pursues the "chilling" purpose of strengthening means to monitor and control political organizations and activities); Chris Yeung & No Kwai-yan, *National Security Terms attacked by A-G*, S. CHINA MORNING POST, Apr. 19, 1997 (reporting colonial government Attorney General's criticism of Tung's assertion that there is no authoritative common law definition of national security).

anyone who might question the territory's new masters. All that has prevented the sword from falling, with potentially ruinous consequences for Hong Kong, is the discretion and uncertain benevolence of the Chief Executive, or of P.R.C. leaders who can pressure the Chief Executive.<sup>599</sup> According to this line of analysis, the S.A.R. has thus failed to establish a rule of law for rights that is sufficiently robust to offer much protection to the people or to the business community.

In attacking post-reversion changes to rights laws, some liberal critics have turned to positivist styles of argument that were not very prominent features of their pre-reversion approach. Thus, for example, they have attacked revisions to the Bill of Rights, Public Order and Societies Ordinances on the grounds that they are the products of a legislature set up in violation of the Basic Law. Similarly, they have charged that the S.A.R. government's national security guidelines fail to conform even to the minimal positivist standard of legality that requires conformity with the underlying statutes.<sup>600</sup>

The post-reversion extension of pre-handover clashes over amendments to late colonial rights laws has not been the only recent major clash over rights-related laws in Hong Kong. Other moves by the Provisional Legislature during the S.A.R.'s initial weeks involved rights issues that were less closely connected to the conflicts of the pre-reversion endgame. Covering matters of labor and immigration law and raising questions about the legislative process, these actions divided the principal Hong Kong players along accustomed lines, and prompted them to make arguments that adapted old themes to new issues. During the first days of the S.A.R., Hong Kong's interim law-making body suspended the operation of several laws that the last colonial Legco passed during its final weeks, suspending their effect until the Provisional

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<sup>599</sup> See, e.g., Braude, *supra* note 581, at 11 (quoting Martin Lee); Lau, *supra* note 578, at 18 (presenting comments of Emily Lau); Joice Pang, *National Security "Knife Hanging Over Us,"* S. CHINA MORNING POST, May 16, 1997, at 3 (quoting spokesman for the Alliance in Support of the Patriotic Democratic Movement in China, a group labelled "subversive" by the P.R.C.).

<sup>600</sup> See Margaret Ng, *We Don't Need Judge Pao Here,* S. CHINA MORNING POST, Sept. 5, 1997, at 27 (arguing that the administrative guidelines "have grossly exceeded even the power set out in the [revised Public Order] Ordinance" and are therefore "ultra vires and unlawful"); cf. Choy & Yeung, *supra* note 599, at 6 (quoting Bar Association chairperson's concern about Chief Executive's failure to offer clear definition of "national security").

Legislature could reconsider and revise them. The most controversial of the affected laws addressed rights of collective bargaining and other union-related issues.<sup>601</sup> Hong Kong liberals, including several members of the Legco that had passed the frozen laws, attacked the Provisional Legislature's moves, often in terms familiar from pre-reversion conflicts. They criticized the interim body's undeliberative methods and its undemocratic spirit in overturning the actions of the democratically legitimate former Legco and in moving to restrict Hong Kongers' associational rights on yet another front. They added another argument that was more distinctly characteristic of the post-reversion period when they warned that the legislature's hasty accession to the government's request was a harbinger of an "executive hegemonism" that could seriously erode Hong Kongers' rights by replacing the rule of law with rule by personal will.<sup>602</sup> While such arguments were to a significant degree about basic rule-of-law principles, as the liberal-democratic perspective understood them, they also sought to draw forth support from a quiescent public that valued the rule of law, if not from a business community that seemed likely to welcome the substance of post-reversion labor laws that the freeze seemed to foreshadow.

S.A.R. officials, the local pro-China press and official P.R.C.

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<sup>601</sup> The three labor-related ordinances that were "frozen" protected workers against dismissal for participation in union activities, permitted unions to fund political activities, and granted, to unions whose members comprise 15% of an employer's employees, rights of consultation and rights to represent employees in collective bargaining with the employer. The Labour Advisory Board later recommended repealing the first two laws. See, e.g., Sharon Cheung, *Board Scraps "Frozen" Labour Laws Passed by Former Legislative Council*, S. CHINA MORNING POST, Aug. 16, 1997, at 6; *Legislators Freeze Four Laws Approved Before the Handover*, New China News Agency, July 18, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File; Tsang Yok-sing, *U-Turn Bad for Labour Relations*, S. CHINA MORNING POST, July 22, 1997, at 16.

<sup>602</sup> Lau, *supra* note 578, at 18 (criticizing the "lightning speed" with which the Provisional Legislature voted to suspend the labor laws and a law to extend the Bill of Rights to cover private actions); Chris Yeung, *A Trade Off with the Rule of Law*, S. CHINA MORNING POST, July 19, 1997, at 17 (describing former Legco president's charge of "executive hegemonism" and liberal *Hong Kong Economic Journal's* warning that the mentality of replacing law and rules by rule by man would undermine the rule of law); cf. Philip Bowring, *What's Changing in Hong Kong*, INT'L HERALD TRIB., Aug. 27, 1997, at 8 (describing the Provisional Legislature as acting as a "rubber stamp" when it "froze" labor protection legislation . . . which did not suit the fat cat groups who dominate" the legislature).

sources defended the freeze. They answered liberals' charges by asserting that the pre-reversion Legco's eleventh-hour passage of the suspended legislation was certainly no less hasty, and was much less responsible, than the Provisional Legislature's defensive moves to prevent the legislation's going into effect. In part seeking popular and business support for the Provisional Legislature's action, these sources further argued that the suspended legislation was incompatible with the interests of the people and the business community in Hong Kong.<sup>603</sup>

Neither Hong Kong government officials nor the region's traditional "pro-China" elements offered unequivocal and undivided support for this line of argument, however. Some of the pre-reversion liberals who remained at high levels in the S.A.R. government appear to have parted company with their new bosses on this issue, seeing a threat to the rule of law and the legal protection of rights in the methods that the S.A.R.'s Chief Executive and legislature had adopted. Also, the freezing of the labor laws seems to have triggered an unusually sharp divide between the Tung administration and its most reliable legislative supporters, on one side, and Hong Kong's most prominent "pro-China" political party and the generally pro-China trade union, on the other.<sup>604</sup>

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<sup>603</sup> See, e.g., *HK Legislators Pass Bill Freezing Some Pre-Handover Laws*, New China News Agency, July 17, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (quoting Tung Chee-hwa's criticism of the "reckless passage . . . without full consultation and detailed study" of laws which might "harm harmonious labor-management relations"); *Hong Kong PLC Operates Successfully, Paper Says*, New China News Agency, July 22, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (describing *Ta Kung Pao* report that the Provisional Legislature concluded that the labor laws "had been adopted without careful study of their impact" and were "harm[ful] to the long-term interests of Hong Kong residents"); *It Is Absolutely Necessary to Freeze the Seven Bills*, *TA KUNG PAO*, July 10, 1997, at A2 (asserting that "the purpose of the former Legco" in "hastily" passing the labor laws was "to resist the Provisional Legislature and pose difficult questions for the S.A.R. government rather than to fight for the rights and interests of workers," and noting the freeze was necessary to prevent "long-term negative impact on society" and to permit the government to "determine whether they conform with the public interest"); Leung, *supra* note 592, at 21 (asserting that there is a "nice irony" to liberals' criticism of the hastiness of the freeze, given the haste with which the initial legislation had been passed).

<sup>604</sup> See, e.g., Fung Wai-kong, *Tung Rift Revealed by Freeze of Laws*, *S. CHINA MORNING POST*, Aug. 11, 1997, at 4 (reporting comments of veteran legislator and Provisional Legislature member that senior S.A.R. officials who had served



In another controversial move during the S.A.R.'s initial weeks, the Provisional Legislature passed legislation to bar P.R.C. children who had a right of abode in the S.A.R. (generally by virtue of having parents resident in the Hong Kong) from entering the territory until they obtained a government entry permit. The new requirement was made retroactive to July 1, thereby making some children already in Hong Kong subject to forcible return to the mainland to await entry permits.<sup>605</sup> Prominent liberal politicians derided the interim legislature's action on the immigration issue as showing the same undue haste and undemocratic spirit that marked the freezing of terminal colonial labor laws. They also attacked the Provisional Legislature for making the rights-stripping legislation retroactive, and for seeking to solve a social problem by denying the children the enjoyment of rights that the Basic Law guaranteed. In an argument reminiscent of pre-reversion debates over rights and surely designed to cultivate popular support, these critics asserted that the flaws in the Provisional Legislature's approach to the question of the mainland children raised the specter of a broader unravelling of legal rights guarantees and the rule of law.<sup>606</sup>

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in the colonial government gave only "lukewarm" support to Tung's proposal to freeze labor and other laws); *HK Legislators Pass Bill Freezing Some Pre-Handover Laws*, *supra* note 603 (describing Tung's condemnation of the labor laws on the merits and Anson Chan's more mild argument that suspension was necessary to permit careful examination of the laws); Tsang, *supra* note 601, at 16 (noting that one-third of the Provisional Legislature, including members of the D.A.B. and the Federation of Trade Unions, had voted against the freeze). Reports of a Tung-D.A.B. split over the issue seem plausible, and the D.A.B.'s stance intelligible, given that the freeze and repeal of the late colonial labor laws is generally thought likely to weaken organized labor, which has been a main cause and constituency for left-leaning Hong Kong political organizations.

<sup>605</sup> See Basic Law, *supra* note 21, art. 24 (providing that people with the "right of abode" in the S.A.R. include "Chinese citizens born in Hong Kong" and "[p]ersons of Chinese nationality born outside of Hong Kong" to specified categories of Hong Kong residents); Immigration (Amendment) (No. 5) Ordinance (1997) (imposing entry restrictions).

<sup>606</sup> See, e.g., Cliff Buddle, *Clamp on Migrant Children "Abuse of Power,"* S. CHINA MORNING POST, Sept. 19, 1997, at 3 (quoting former Exco member and lawyer's charges that the immigration law amendments impermissibly sought to "correct[] perceived social problems occasioned by permanent residents asserting their constitutional right" and that making the effect retroactive to July 1 was a troubling "legal fiction"); *Democrats' Martin Lee Unhappy With Retrospective Immigration Law*, transcribed in BBC Summary of World Broadcasts, July 10, 1997, available in LEXIS, Asiapc Library, Allasi File (quoting Martin Lee's comments that the immigration amendment bill was "a

P.R.C. and pro-China sources, joined by the S.A.R. government, defended the legislature's actions, primarily in positivist terms that were broadly familiar from pre-reversion arguments. They insisted that the restrictions adopted by the Provisional Legislature did not take away rights of abode granted under the Basic Law and were consistent with earlier mainland laws and administrative practices for processing such children's applications to enter Hong Kong. In addition, they sought to play an unusually strong popular opinion card, asserting credibly that most Hong Kong people supported limits on the pace of an influx that could strain social services and overburden public amenities.<sup>607</sup>

#### 4.2.2.2. *The Provisional Legislature and the 1998 Elections*

The legitimacy and legality of the Provisional Legislature have remained divisive issues in post-reversion Hong Kong. During the S.A.R.'s first weeks, an unsuccessful court challenge to the body's constitutionality under the Basic Law formed a principal focus of

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dangerous precedent" and "contravened the Basic Law," and that its retrospective application would "make it much worse, because under common law you just do not take away . . . acquired rights," such as the right of abode that the affected children acquired at birth); Ng, *supra* note 589, at 19 (criticizing Provisional Legislature for passing the immigration legislation within one day after gazetting and without prior consultation or significant amendment).

<sup>607</sup> See, e.g., *Amendment of Immigration Bill Conforms to Basic Law*, TA KUNG PAO, July 9, 1997, at A2 (arguing that the children's assertion of their legal right of abode cannot "become a pretext" for their "illegal action" of "crossing the border illegally"); Andy Ho, *End of the Honeymoon*, S. CHINA MORNING POST, July 15, 1997, at 21 (noting independent surveys indicating 80% support in Hong Kong for imposing some restrictions on entry into Hong Kong of mainland children with right of abode in Hong Kong); *Implement Basic Law in Practical Way*, TA KUNG PAO, July 14, 1997, at A2 (asserting that the permit requirements imposed by the immigration amendment were consistent with Basic Law, art. 22, which requires people entering Hong Kong from other parts of China to "apply for approval," and arguing that "Hong Kong people must understand that if we let a large number of mainland children come to Hong Kong all at once, Hong Kong cannot stand the strains"); Leung, *supra* note 592, (presenting S.A.R. Secretary for Justice's defense of retrospective effect of the immigration amendments as "necessary to ensure that the same system of verification should apply to all who claim the relevant right of abode"); Teng Yue, *Exit Visas Granted as Usual to Mainland Children Born to Hong Kong Residents*, WEN WEI PO, July 17, 1997 (quoting Director of Public Security Bureau's Exit and Entry Management Subbureau's account of established laws and practice).

controversy.<sup>608</sup> Defending the Provisional Legislature in court and in the broader public arena, the S.A.R. government and Hong Kong's pro-China press have built upon the positivist arguments that China and its allies had offered during pre-reversion debates about the interim body's legitimacy. They have repeated and extended pre-reversion assertions that the Basic Law and several N.P.C. Decisions provide ample legislative authorization for the establishment of the Provisional Legislature. On this analysis, the Basic Law and the 1990 N.P.C. Decision concerning the formation of the first S.A.R. legislature reserved to the P.R.C. the discretion to determine how the first legislature would be established. That N.P.C. decision and a subsequent N.P.C. Standing Committee Decision authorized the Preparatory Committee to exercise that discretion and to do whatever was necessary to establish an effective S.A.R. government. Decisions by the Preparatory Committee in 1996 then exercised this delegated authority to establish the Provisional Legislature and to define its powers and functions. The N.P.C. then removed any lingering doubt about the Provisional Legislature's status as the product of China's sovereign acts when the N.P.C. ratified the actions establishing the

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<sup>608</sup> See *HKSAR v. Ma Wai Kwan David & Ors*, 1997-2 HKC 315, 1997 HK LEXIS 57 (Hong Kong Court of Appeal, July 22, 1997). In the words of one member of the three-judge intermediate appellate court that decided the case, the "momentous" question of the legality of the Provisional Legislature came before the court in a "somewhat incidental way." *Id.* at \*78. Indicted for a common law criminal conspiracy offense during colonial rule, the defendants argued that they could not be prosecuted because no proper and effective action had been taken to preserve the indictment, to adopt as S.A.R. law the law under which they were charged, or to establish the court which was trying them. They claimed that the P.R.C., through the N.P.C. and its Standing Committee, had not taken necessary affirmative steps to accomplish these three tasks, and that the Provisional Legislature's attempt to accomplish those tasks through the Reunification Ordinance were ineffective because the Provisional Legislature itself was unlawful. In three separate opinions, the judges of the Court of Appeal held that the Basic Law itself accomplished the tasks in question. Addressing the legality of the Provisional Legislature only in an alternative holding and in dicta, the judges all concluded that the Provisional Legislature had been established through sovereign acts of the P.R.C. (by the N.P.C. and its delegates), the validity (although not the existence) of which were beyond the jurisdiction of S.A.R. courts to review. Accordingly, a challenge to the indictment and prosecution, based on the invalidity of the Reunification Ordinance as the product of an unlawful legislature, must fail. To varying degrees, the opinions went on to reject the defendants' arguments about the Provisional Legislature on the merits, stating that the body's establishment did not contravene, or require amendment of, the Basic Law.

body in a March 1997 resolution approving the Preparatory Committee's work.<sup>609</sup>

In addition, familiar claims about the importance of avoiding a legislative "vacuum" became a piece of a more elaborate legal-political argument that the doctrine of "necessity," and the broader idea of preventing legal chaos, warranted upholding the validity of the Provisional Legislature and its actions. From the perspective of the S.A.R. officials who largely adopted the pre-reversion arguments of the pro-China camp, the post-reversion context made more immediate and tangible the dire consequences of concluding that the enactments of the Provisional Legislature were not laws for Hong Kong. In their view, finding for the defendants in the case challenging the law-making body's legality raised the specter of *de facto* legalization of post-reversion criminal acts and the removal of vital — and popular — restrictions that post-reversion laws imposed on mainland immigrants. Although the court declined to decide the government's argument that the doctrine of necessity required the court to find in the government's favor and preserve legal and institutional continuity, the judges embraced another broadly related and generally positivist argument that was acceptable to the S.A.R. government and pro-China elements: Even if the Provisional Legislature's establishment did not conform to the Basic Law's and the N.P.C.'s requirements for the first S.A.R. legislature, the interim body was still lawful, for it was not the first S.A.R. legislature. Rather, it was a temporary legislative organ with limited powers that would serve until the first true S.A.R. legislature could be elected in

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<sup>609</sup> See generally Ma, 1997 HK LEXIS 57, at \*46-\*48, \*61-\*62, \*90-\*92, \*96 (describing Solicitor General's arguments for Provisional Legislature's legality); see also Edward A. Gargan, *Hong Kong Court Upholds China's Rule*, N.Y. TIMES, July 30, 1997, at A10 (quoting Solicitor General Fung's description of the court's decision as "unanimous" that the Provisional Legislature "is a valid, competent body"). In the context of the *Ma* litigation, the point was somewhat narrower than extrajudicial arguments about the Provisional Legislature's legality may seem to suggest. The Solicitor General's argument and the court's analysis of the N.P.C. and P.C. actions and the "legality" of the Provisional Legislature unfolded against the background of a successful argument that the court did not have jurisdiction to hear challenges to the validity of the N.P.C.'s decisions — or the P.C.'s decisions to the extent that the P.C. exercised delegated sovereign power — where those challenges were based on the actions' incompatibility with the Basic Law or other P.R.C. laws. The court thus stated that it limited its inquiry into the existence and purported effect of those sovereign acts, which were matters that the court claimed authority to review.

1998.<sup>610</sup>

Having won its case in the courtroom, the S.A.R. government, along with some pro-China members of the legislature, turned to the issue of popular and business reactions. These sources asserted that the laying to rest of doubts about the Provisional Legislature would, or at least should, receive a warm reception from the Hong Kong people and Hong Kong's business community. Echoing pre-reversion arguments for popular and business acceptance of the Provisional Legislature and building upon in-

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<sup>610</sup> See Ma, 1997 HK LEXIS 57, at \*65, \*98, \*128 (refusing to rule on the government's "necessity" arguments, but indicating acceptance of the government's argument that the creation of the Provisional Legislature was necessary to avoid a legislative vacuum). The S.A.R. government's invocation of the doctrine of necessity in the *Ma* need not have extended beyond the claim that the doctrine's imperative to avoid legal chaos required the continuation in force of the common law if the Basic Law and the Reunification Ordinance were both held not to have done so. That is, the court could have relied upon the doctrine to preserve the common law of criminal conspiracy (and the common law more generally) without holding that the doctrine supported recognition of an otherwise unlawful local legislative body or the laws it passed, including the Reunification Ordinance. Comments made outside of arguments to the court, and perhaps some in-court arguments as well, however, made the broader assertion that "necessity" broadly defined, or some kindred notion, required upholding the legality of the Provisional Legislature itself. See, e.g., Charlotte Parsons, *Court 'Must Accept' Body*, S. CHINA MORNING POST, July 23, 1997, at 1 (quoting Solicitor General Fung's comment that the Provisional Legislature's legality must be upheld lest Hong Kong slip into a legal vacuum and "a people or a society" be "sacrifice[d]" . . . under the banner of the rule of law"); Charlotte Parsons, *Solicitor General Admits Interim Body Does Not Fulfil NPC Rules; Law 'Had to be Broken'*, S. CHINA MORNING POST, July 25, 1997, at 1 (quoting Fung's argument to the court that a Provisional Legislature not compatible with the N.P.C.-established requirements for the first S.A.R. legislature was necessary because establishing a Basic Law-conforming first Legislature — or amending the Basic Law — by July 1, 1997, "could not have been done as a matter of law. It's not a question of short cuts. There was no easy way out."); Jim Erickson & Law Siu-lan, *Sovereignty and the Law*, ASIaweek, Aug. 8, 1997, at 18 (noting government's arguments that a ruling for the defendants would have overturned "traditional common law on everything from property rights to prohibitions against bank robbery," as well as post-reversion statutes including the one that authorized deportation of mainland children); cf. *Excessive Political Tasks, Inadequate Legal Backing*, HSIN PAO, July 30, 1997, at 1 (finding merit in the contention by counsel for the *Ma* defendants that using the doctrine to support the legality of the Provisional Legislature would be dangerous). See also Ma, 1997 HK LEXIS 57, at \*60, \*90-\*91, \*127-\*128 (accepting government's argument that the Provisional Legislature was not the first S.A.R. Legislature and thus not required to satisfy the requirements for "election" and composition set forth in Basic Law, art. 68, Annex II to the Basic Law, or the N.P.C. Decision of April 4, 1990).

court arguments stressing the need to avoid legal chaos, they asserted that the court's decision vindicated long-standing claims that the body was legal, and thus eliminated uncertainty that had threatened to produce needless, unpopular, and economically dangerous instability and losses of confidence in Hong Kong.<sup>611</sup>

Despite considerable continuity with pre-reversion patterns of argument in favor of the Provisional Legislature, fissures within the broadly "pro-China" camp seem to have grown deeper or more evident, especially concerning issues of the temporary law-making body's role. During the early months of the S.A.R., legislators, including some from the D.A.B., have been increasingly vocal in insisting that the interim legislature is not, and must not be, a "rubber stamp" with narrowly limited powers — reportedly to the consternation of the most ardently pro-China legislators and the Tung administration.<sup>612</sup> Departing from the

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<sup>611</sup> See, e.g., Angela Li, *Rita Fan Welcomes End to Uncertainty*, S. CHINA MORNING POST, July 30, 1997, at 6 (quoting Provisional Legislature President Rita Fan's statement that the court "made very clear that the legality" of the Provisional Legislature "is sound and strong and what we are now doing is legitimate," reporting D.A.B. Chairman and Provisional Legislature member Tsang Yok-sing's view that the court's decision would "help the legal status" of the Provisional Legislature," noting pro-China legislator Selina Chow's comment that the ruling provided "certainty" to Hong Kong and the international business community, and describing the response of the pro-business Liberal Party to the ruling as "enthusiastic"); Charlotte Parsons, *Legislature Left Open to Attack*, S. CHINA MORNING POST, July 30, 1997, at 1 (quoting Anson Chan's and Tung Chee-hwa's comments welcoming the verdict, and Chan's statement that the ruling "helps to clear up some doubts" about the interim body's status); Frank Zhang, *Court of Appeal Approves Hong Kong's Legislature*, July 29, 1997, Agence France Presse, July 29, 1997, available in LEXIS, Asiapc Library, Allasi File (noting stock market rise to record high as indicating apparent support for the ruling in the business community).

<sup>612</sup> See, e.g., *Provisional Legislature Will Never Serve as Rubber Stamp*, SING TAO JIH PAO, July 16, 1997, at A15 (quoting Provisional Legislature President Rita Fan's assertion that the body has "the role of monitoring the government," "will never serve as a rubber stamp," and has developed a parliamentary culture that has already achieved results); No Kwai-yan, *Too Late to Put Back Genie of Chamber*, S. CHINA MORNING POST, Aug. 8, 1997, at 4 (quoting D.A.B. vice chairman and legislator Cheng Kai-nam's statement that Provisional Legislature's early votes "should have alerted Tung Chee-hwa that he should not hold high hopes" that the body would be "a rubber stamp" rather than "a counterforce," and noting former Preparatory Committee member Lau Siu-kai's criticism that the Provisional Legislature seemed to be exceeding its powers); Tsang, *supra* note 601 (noting that one-third of the Provisional Legislature, including D.A.B. members, voted against the S.A.R. government's proposal to freeze late colonial amendments to labor laws).

S.A.R. government's line on several points, the most prominent D.A.B. legislator has both stressed the Provisional Legislature's room for discretionary legislative choices, and expressed doubts about its popular, and even its legal, legitimacy.<sup>613</sup>

Throughout these post-reversion debates concerning the Provisional Legislature, official P.R.C. sources have remained relatively quiet for any of several possible reasons, including: reluctance to take sides openly in emerging disputes between a China-picked and legally P.R.C.-accountable administration and "pro-China" legislators; strong agreement with the S.A.R. government's principal arguments in the court case challenging the Provisional Legislature; and prudential calculation that strong support from Beijing for the side that was likely to win anyway would needlessly exacerbate fears of extensive P.R.C. intervention and weak S.A.R. autonomy that the litigation and the broader political controversies surrounding the Provisional Legislature were already provoking in some quarters in Hong Kong.

On the other side of the fault line that has continued to divide most key players in the politics and legal-institutional controversies of transitional Hong Kong, liberals and democrats have extended their pre-reversion assaults on the Provisional Legislature and their pre-reversion attempts to rally key social constituencies' support for their positions, although the specific terms of their criticisms have shifted somewhat to reflect the conditions of the post-reversion period. Thus, prominent former members of Legco have led denunciations of the Provisional Legislature for rubber-stamping the rights-betraying and democracy-undermining proposals of a dangerously unchecked and illiberal regime. These critics also have argued that the unseemly speed with which the legislature enacted such measures has provided further evidence of an undemocratic and high-handed executive-dominated government that will leave the people, and the business community, with little more than the good will of the Chief Executive to protect

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<sup>613</sup> *Electoral Law Faces Challenge by ADPL*, S. CHINA MORNING POST, July 23, 1997, at 6 (quoting Tsang Yok-sing's statement that, "[i]t's not so clear whether the Preparatory Committee's decision [regarding the constituencies for the first S.A.R. legislature elections] is legally binding" on the Provisional Legislature, in light of the "spirit" of "leav[ing] more room" for the S.A.R. to make its own decisions); Li, *supra* note 611, at 6 (reporting Tsang's view that the ruling in the *Ma* case would "help the legal status" of the Provisional Legislature, but was "by no means a conclusive" result, and did not insulate the body from intervention and interference by the N.P.C.).

their rights.<sup>614</sup>

The court ruling rejecting the challenge to Provisional Legislature's legality deepened liberals' and pro-democracy forces' concerns, and failed to silence lines of argument rooted in the liberal-democratic camp's pre-reversion positions. Acknowledging that "the law" now was that the N.P.C. or its delegates could "make sovereign acts which may not necessarily comply with the Basic Law," the Chairman of the Hong Kong Bar Association went on to criticize the ruling from a non-positivist perspective, saying that "[t]he Basic Law must," as a normative and constitutional matter, "bind the National People's Congress," and that the court's analysis had erred in adopting a "backward-looking" focus on the limited powers of constitutional review wielded by colonial courts rather than a more "forward-looking" focus on courts' appropriate powers in a new constitutional system for Hong Kong. In the wake of the ruling, Margaret Ng pointed to a still bleaker possibility in the court's apparent adoption of a concept of "unchallengeable acts of the sovereign." For Ng, such a doctrine portended a nightmare of radical P.R.C.-style positivism that would accept China's discretionary authority to set narrow limits on Hong Kong's legislative autonomy and to render the local legislature, and the S.A.R's supposed constitution, irrelevant.<sup>615</sup>

Despite the unpositivist tone of many liberal reactions to the decision in the Provisional Legislature case, the litigation also pushed liberals and democracy advocates, and especially the

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<sup>614</sup> See, e.g., Fanny Wong, *Business as Usual but No Enthusiasm*, S. CHINA MORNING POST, Aug. 31, 1997, at 11 (noting wide-spread perception, and criticism, of the Provisional Legislature's unwillingness or inability to hold government accountable or to resist its legislative proposals); see also *supra* notes 589, 602, 606 and accompanying text.

<sup>615</sup> See Angela Li, *Bar Chief Hits at "Backward-Looking" Example in Provisional Legislature Case*, S. CHINA MORNING POST, Sept. 13, 1997, at 6; Margaret Ng, *Decision that Resonates*, S. CHINA MORNING POST, Aug. 8, 1997, at 19 (arguing that the court's reference to "an unchallengeable act of the sovereign" was "difficult to understand," but might mean that "the NPC reserves an unlimited power to legislate for Hong Kong which it can exercise in any way and at any time it sees fit"); cf. Sharon Cheung, *Lee Says No to New Legal Challenge*, S. CHINA MORNING POST, July 6, 1997, at 4 (quoting Martin Lee's comment, in the aftermath of court's dismissal of an earlier challenge to the legality of the Provisional Legislature, that Democrats would have no "direct contact with" the Provisional Legislature "because we don't think it is a legal body").



lawyers prominent among their leadership, to rely more heavily on what are at base positivist arguments. Most simply, the suit challenging the Provisional Legislature was fought, and had to be fought, largely on the grounds that the body did not conform to the Basic Law and related N.P.C. decisions. This claim, that the Provisional Legislature failed under the very legal standards that China had chosen to establish, was an argument that liberals and democrats had adumbrated in pre-reversion conflicts, but it became much more central to their position when the court challenge became the principal focus of post-reversion conflicts over the Provisional Legislature.<sup>616</sup>

In the controversies over the Provisional Legislature during the S.A.R.'s early months, the U.K. has been much more restrained than Hong Kong liberals in defending and advancing the norms underlying the Patten reforms, which Britain continues to embrace in principle. Although regarding the Provisional Legislature as of "dubious legality" and "a step backwards on the freedoms enjoyed in Hong Kong," the official British position has ultimately accepted the body's existence. The U.K. government has urged the interim law-making organ, rather mildly, to "confine itself to legislating only on what is urgent and necessary," and to leave other issues to be addressed by the first true S.A.R.

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<sup>616</sup> See, e.g., Ma, 1997 HK LEXIS 57, at \*48-\*51, \*85-\*89, \*120-\*122 (describing defendants' counsel, and liberal lawyer, Gladys Li's arguments to the court: (1) that the Provisional Legislature was, in fact, the first legislature of the S.A.R. and therefore had to conform to the requirements imposed by article 68 of the Basic Law and the Joint Declaration, which require that the legislature be constituted by elections, and by Annex II to the Basic Law and the April 4, 1990, N.P.C. Decision which prescribe the composition of the first S.A.R. Legislature; (2) that the March 14, 1997, N.P.C. Decision approving the Preparatory Committee's report on its actions establishing the Provisional Legislature did not, as a matter of Chinese law, ratify the establishment, as the first S.A.R. legislature, of a body that failed to conform to these legal standards; (3) that the Basic Law needed to be, and had not been, amended in accordance with the procedures set forth in article 158 of the Basic Law in order to permit such a body to constitute a lawful first S.A.R. legislature); Ng, *supra* note 615, at 19 (presenting similar argument of Margaret Ng, former pro-democracy Legco member and Li's co-counsel in Ma); *Excessive Political Tasks, Inadequate Legal Backing*, HSIN PAO, *supra* note 610, at 1 (criticizing the court for not taking more seriously arguments that the Provisional Legislature's formation must conform to the procedures set forth in the Basic Law if the body is to be lawful, and that the N.P.C.'s purported ratification of the decision to establish the Provisional Legislature was an amendment to the Basic Law "not done according to the procedures" required by the Basic Law).

Legislature that will be elected in 1998.<sup>617</sup>

The legal arrangements for the elections that will choose that body have been a second principal focus of post-reversion conflict over the legislature, democracy and the law. The government proposed, and the Provisional Legislature passed, an electoral law for the 1998 balloting that differs significantly from the law for the 1995 elections, which implemented the Patten reforms. Twenty members will represent geographic constituencies, but the single-member, first-past-the-post system will be replaced by a system of fewer, multi-seat districts with members selected on the basis of proportional representation (on the basis of ballots cast for party slates, not individual candidates). Thirty members will represent functional constituencies, but the eligible electorate will be roughly one-tenth the size that it was in 1995. An election committee will choose the remaining ten members. Instead of the panel of officials elected to local office that formed the election committee in 1995, however, the 1998 election committee will be an appointed, corporatist body similar in composition to the Selection Committee that nominated the Chief Executive and named the members of the Provisional Legislature. Candidates who hold foreign passports or have rights of abode abroad, whom the Basic Law permits to occupy twelve seats in the legislature, will not be allowed to run in the most broadly elected constituencies.<sup>618</sup>

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<sup>617</sup> See *Hong Kong Rebuts Urgings of Former Sovereign*, *supra* note 577 (quoting semi-annual government report to Parliament on conditions in Hong Kong). The British government's position is, ironically, akin to the argument calling for acceptance of "reality" that P.R.C. and pro-China sources urged during the final pre-reversion conflicts over political reform, and is also reminiscent of pro-China business leaders' urging Patten to restrict the scope of his administration's and Legco's activities during the final months of colonial rule.

<sup>618</sup> See Basic Law, *supra* note 21, Annex I (prescribing mix of geographic, functional and election committee-chosen constituencies for first S.A.R. legislature); Electoral Provisions (Amendment) Ordinance (1994) (enacting the Patten reforms to govern the 1995 Legco elections); Electoral Provisions (Amendment) Ordinance (1997) (enacting the arrangements for the 1998 Legco elections); Basic Law, *supra* note 21, Annex II (prescribing the sectoral composition of the Selection Committee); *id.*, art. 67 (providing that "permanent residents" of the S.A.R. who "are not of Chinese nationality or who have the right of abode in foreign countries" may be elected to the Legislature, "provided that the proportion of such members does not exceed 20 percent of the total membership"); see also *Chief Executive in USA Defends Electoral Changes as Move Towards More Democracy*, *supra* note 586 (describing Tung

S.A.R. officials have defended this arrangement as sufficient to produce "fair, open and honest" elections and a "credible legislature," and as compatible with "democracy," which is the "hallmark of the new era."<sup>619</sup> While these broad assertions echo both the colonial government's and the pro-China camp's pre-reversion arguments in favor of their conflicting positions on the legislature and democratic reform, other elements in the S.A.R. government's arguments for the new electoral law — as well as the content of that legislation — have clear affinities with the China and pro-China perspective on pre-reversion issues, and have dove-tailed with post-reversion arguments from pro-China elements in Hong Kong. Perhaps most notably, a key defense of the new electoral arrangements has been more broadly and aggressively positivist than Patten's defensive assertion that the 1995 rules were compatible with the Basic Law: There are many versions of democracy; Hong Kong has chosen, and its legislature has lawfully enacted, a version that best fits Hong Kong's current circumstances and that constitutes a prudent, careful first step in the journey toward the system of universal suffrage that the Basic Law mandates as an ultimate goal.<sup>620</sup>

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administration's proposed legislation to govern the 1998 Legco elections); Linda Choy, Quinton Chan & No Kwai-yan, *Anger at Guidelines for Legco Elections*, S. CHINA MORNING POST, July 9, 1997, at 1 (describing Tung administration's proposals and liberal responses).

<sup>619</sup> Andy Ho, *Risk-Free Elections*, S. CHINA MORNING POST, Aug. 16, 1997, at 17 (quoting official government description); Peter Lim, "Chinese Values" *Take Over in Hong Kong*, Agence France Presse, July 1, 1997, available in LEXIS, Asiapc Library, Allasi File (quoting Tung Chee-hwa); Chris Yeung, *Keeping a Tight Rein on Legco*, S. CHINA MORNING POST, July 12, 1997, at 15 (quoting Secretary for Constitutional Affairs Nicholas Ng Wing-fui).

<sup>620</sup> See, e.g., Anson Chan in *USA Defends Electoral Changes, Rule of Law*, *supra* note 585 (presenting Anson Chan's comments that "[v]arious groups in Hong Kong have different views" about what mix of constituencies for the 1998 elections are "more or less democratic," that "[w]e all know that there is no universal truth about the perfect election," and that, while "[w]e may prefer one system[,] . . . each society should be allowed to develop its own process based on its own particular . . . conditions"); Chief Executive in *USA Defends Electoral Changes as Move Towards More Democracy*, *supra* note 586 (presenting Tung's remarks that "there will always be debates" about constitutional questions of democracy, and that "[t]he Basic Law provides that further democratic evolution will depend on the . . . overall environment at that time with universal suffrage being the ultimate objective"); Hong Kong Chief Executive Promises More Democracy, Agence France Presse, Sept. 9, 1997, available in LEXIS, Asiapc Library, Allasi File (quoting Tung Chee-hwa, asserting that being "prudent and careful" was a "good way of moving forward

In addition, other comments from government officials and unofficial P.R.C. supporters in Hong Kong have blended venerable "pro-China" arguments for the adequacy of an electoral law that rejects the Patten reforms with arguments that have attempted to bolster or assert popular and business backing for the less expansively democratic arrangements that the new law will introduce. For example, S.A.R. officials have claimed that a system of proportional representation will yield a legislature that accurately reflects the will of the voters in geographic constituencies, and that the narrowed functional constituencies will ensure proper representation of business and other important sectors of the community during the transition to democracy.<sup>621</sup> An immediate leap to a system of direct, universal suffrage would lack these virtues and, a pro-China newspaper sycophantically opined, might have led to the selection of someone other than the excellent and popular Tung Chee-hwa if it had been applied in the Chief Executive selection process.<sup>622</sup> S.A.R. officials, with support from pro-China sources, have further maintained that the new electoral law is the product of adequate consultation with the people.<sup>623</sup> In arguments that at times evoke the P.R.C. and pro-China side's pre-reversion appeals to Hong Kongers' senses of Chinese nationalism and anti-colonialism, they also have asserted that the people would accept the law, once they understood the opportunity it gave them for participation in a system that

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on democracy"); see also Tsang Yok-sing, *Finding a System that Fits the Bill*, S. CHINA MORNING POST, Sept. 16, 1997, at 24 (presenting D.A.B. leader's assessment of proposed electoral legislation and its validity in terms of compatibility with the text of the Basic Law).

<sup>621</sup> See, e.g., Choy, Chan & No, *supra* note 618, at 1 (quoting Secretary for Constitutional Affairs Ng's assertion that "[t]he proportional representation system more accurately reflects the will of the voters" than the single-member district system); Leung, *supra* note 592, at 21 (presenting Secretary for Justice Leung's assertion that the revamped functional constituencies would "ensure that certain important sectors within the community that have made significant contributions are duly represented").

<sup>622</sup> See *Safeguard the Authority of the Basic Law*, *supra* note 588, at A2.

<sup>623</sup> See, e.g., Leung, *supra* note 592, at 21 (presenting comments of Secretary for Justice Leung); *New Constitutional Affairs Official Says 1998 Elections "Top Priority"*, WEN WEI PO, Aug. 6, 1997, translated in BBC Summary of World Broadcasts, Aug. 13, 1997, available in LEXIS, Asiapac Library, Allasi File (reporting favorably Secretary for Constitutional Affairs Suen's description of extensive consultation with the public concerning key aspects of the new electoral law).

ultimately would be more democratic than anything the people of Hong Kong had enjoyed under colonial rule.<sup>624</sup>

In keeping with the P.R.C.'s public restraint on most controversial legal and institutional issues in early post-reversion Hong Kong, Chinese official sources remained on the sidelines of the debate over an electoral law that the S.A.R. was certain to adopt and that would implement arrangements similar to those China had favored in the pre-reversion clashes. Similarly characteristic of its reduced role and quiet approach to post-reversion controversies, the U.K. has staked out a moderate, perhaps reticent, position concerning the legislation to govern the 1998 Legislative elections. Reiterating a commitment to democracy for Hong Kong, British official statements criticized retrenchment from the baseline established in the Patten reforms, but added that Britain believed it would possible to have open and fair elections in 1998 under rules that Britain expected to be substantially less broadly democratic than those that had governed the 1995 elections.<sup>625</sup>

Hong Kong liberals and democrats have pursued a much more forceful and uncompromising critique of the S.A.R. government's arrangements for the 1998 elections, one that often has echoed their arguments concerning the legislature and democratization in the early and middle 1990s. Martin Lee, Emily Lau and others have denounced the new electoral arrangements as "disgraceful" and "a giant leap backwards," and the beginning of the "Singaporisation" of Hong Kong.<sup>626</sup> In their view, the new law is danger-

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<sup>624</sup> See, e.g., *New Constitutional Affairs Official Says 1998 Elections "Top Priority,"* *supra* note 623 (quoting, in favorable report in pro-China press, S.A.R. Secretary for Constitutional Affairs' expectation that "the public will acquire an adequate understanding" of the new law); *Elections Called Stepping Stone to Universal Vote*, New China News Agency, Sept. 15, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (quoting Anson Chan's belief that "Hong Kong people will respond to the opportunity — the historic opportunity — to take part in its first democratic election as . . . part of an increasingly open, prosperous and powerful China"); *Hong Kong Chief Executive Promises More Democracy*, *supra* note 620 (quoting Tung's assertion that elections for the second S.A.R. Legislature would provide greater democracy than Hong Kong had ever experienced under colonial rule).

<sup>625</sup> See, e.g., Lau, *supra* note 578, at 18; *Hong Kong Rebuts Urgings of Former Sovereign*, *supra* note 577.

<sup>626</sup> Lowe, *supra* note 590 (quoting Emily Lau); Ridding, *supra* note 581, at 22 (quoting Martin Lee).

ously inconsistent with the requirements of a just and adequate rule of law, which include having a democratically accountable government.<sup>627</sup> Liberal and pro-democracy leaders have charged that the legal arrangements for the 1998 elections are consciously designed to reduce the number of seats in the legislature held by Democrats and independents — the groups who have been the legislators most able and dedicated to holding the administration accountable, and who had triumphed in the universal suffrage constituencies under the old rules. Specifically, they have attacked the shift to proportional representation in the geographic constituencies, the drastic reduction in the size of the electorate for functional constituencies, the establishment of a pro-business and pro-establishment Election Committee, and the restriction of foreign passport-holders to candidacy in twelve functional constituencies. They have condemned these revisions as attempts to “work backwards” to achieve the regime’s desired results “by changing the law.”<sup>628</sup> The new law’s critics asserted that such

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<sup>627</sup> See, e.g., Yeung, *supra* note 582, at 6 (quoting Martin Lee’s comment that “a lasting guarantee for the future lay with the establishment of a democratic system” which would render the Legislature and Chief Executive truly accountable).

<sup>628</sup> See, e.g., Choy, Chan & No, *supra* note 618, at 1 (quoting Martin Lee’s condemnation of the government’s result-oriented approach to crafting electoral laws); *Hong Kong Democrats Warn of “Singaporisation,”* Agence France Presse, July 3, 1997, available in LEXIS, Asiapc Library, Allasi File (reporting Martin Lee’s assertion that Democrats in post-reversion Hong Kong still “have the hearts and minds of the people” and thus would do very well if S.A.R. legislative elections were “really fair and open”); Ng, *supra* note 600, at 27 (presenting Margaret Ng’s critique of the principal features of the proposed electoral laws as, “[s]hort of actually barring” democrats from running, “the most effective way to limit the seats” that the government’s “chief critics” can win); Ridding, *supra* note 581, at 22 (describing Martin Lee’s denunciation of the shift to proportional representation as an attempt to cut the ranks of government critics in the legislature); Linda Choy & Quinton Chan, *Passport Curb Challenged, Pro-Democracy Activists Hit Hardest by SAR Poll Restrictions*, S. CHINA MORNING POST, July 10, 1997, at 8 (noting that Emily Lau, Christine Loh, and Huang Chen-ya, leaders of three principal pro-democracy parties in the S.A.R. and elected representatives of geographic constituencies in the 1995-elected Legco, were foreign passport holders). With the exception of the Legal constituency, few if any of the twelve functional constituencies in which foreign passport-holders were to be permitted to run seemed, in light of the economic sector or organization represented and the apparent political leanings of the constituency’s electorate, to be a plausible seat for any of the leading foreign passport-holding democrats. The designated constituencies included Accountancy, the General Chamber of Commerce, Engineering, Finance, Financial Services, the Federation of Hong Kong Industries, Legal,

arrangements both undermined basic principles of democracy and thwarted the popular will. In arguments that echoed pre-reversion efforts to claim popular support for liberal positions on a variety of issues, prominent democrats charged that the new electoral scheme is "a big insult to the people," in "serious contravention of public opinion," and the product of a sham process of popular consultation.<sup>629</sup> According to some of Hong Kong's leading liberals, the unaccountable S.A.R. government that the new electoral law will permit is something that neither the people nor the business community should or would ultimately welcome.

Although there has been substantial continuity between Hong Kong liberals' and democrats' arguments against the law to govern the 1998 elections and their arguments in favor the Patten reforms (or more radically democratizing alternatives) for the laws governing the 1995 elections, liberal-democratic arguments in the post-reversion period have seemed to indicate significant fragmentation and a new uncertainty in Hong Kong's pro-democracy circles. As developments in the final months of the colonial rule had foreshadowed, leading democrats and independents have

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Architectural, Real Estate and Construction, Tourism, Import and Export, and Insurance. The Democrats had won nineteen of sixty seats in the 1995 Legco elections, and many of the twenty independents elected that year were staunchly "pro-democracy." See, e.g., do Rosario, *Stand Up and Be Counted*, *supra* note 106, at 17.

<sup>629</sup> Yeung, *supra* note 582, at 6 (quoting Martin Lee's criticism of the functional constituency arrangements); Choy, Chan & No, *supra* note 618, at 1 (quoting Martin Lee's criticism of the proportional representation, multi-member district arrangements); Ng, *supra* note 581, at 19 (presenting Margaret Ng's criticism of a mere seven-day public consultation period on planned electoral law changes); Chris Yeung & Genevieve Ku, *Public Gets Limited Say on Elections*, S. CHINA MORNING POST, May 28, 1997, at 1 (quoting Democratic Party vice chairman's criticism that public consultation on proposed law was "consultation within a bird cage" and "not a responsible way of collecting public opinion").

Early public opinion polls reinforced the credibility of critics' claims that the planned electoral arrangements were unpopular. See Danny Gittings, *Polls Give Lie to Election Claims*, S. CHINA MORNING POST, Sept. 14, 1997, at 10 (reporting 70% opposition to the reduction in functional constituency electorates, and only 26% support for proportional representation in geographic constituencies); *Most Oppose New Voting System*, S. CHINA MORNING POST, Sept. 1, 1997, at 4 (reporting 51% support for first-past-the-post system for geographic constituencies, 21% support for proportional representation, 44% agreeing that elections under the new rules would be "open, fair, honest and acceptable to the Hong Kong people," and a nearly equal number (38%) disagreeing with that proposition).

divided over how strictly to oppose the new electoral arrangements and how to approach the elections to be held under them. Although sharp denunciations of the new electoral law have been common, at least one established pro-democracy politician has accepted the new rules, and even Martin Lee has mixed his criticisms with a cautious optimism about the state of the law and democratic institutions.<sup>630</sup> In what seems to be a more narrowly post-reversion phenomenon (and perhaps in anticipation of bringing a court challenge to the new election law's constitutionality), some leading pro-democracy politicians have addressed the issue on more positivist terms. Seemingly more than in pre-reversion debates, they have attacked the new electoral arrangements for being incompatible with the requirements set forth in the Basic Law, as well as with fundamental democratic principles.<sup>631</sup>

4.2.2.3. *The Court of Final Appeal and Judicial Review in the S.A.R.*

The installation of the Court of Final Appeal's four permanent members, and the naming of expatriate and local judges who could serve as the five-member bench's lone temporary judge, have provided another occasion for the principal participants in Hong Kong politics to assess the propriety of the S.A.R.'s legal and institutional arrangements. A fundamentally positivist conception of the Court, evocative of P.R.C. and pro-China arguments from the pre-reversion period, seemed evident in the Provisional Legislature's July 1 confirmation of the previously vetted permanent judges' and Chief Justice's appointments by means of the omnibus Reunification Ordinance, and in the Provisional Legislature's early enactment of additional legislation

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<sup>630</sup> See, e.g., deLisle, *supra* note 27, at 110-12 (describing pre-reversion splits among democrats as they began to contemplate their post-reversion future); Rodger Lee, *Christine Loh to Give Up Passport*, S. CHINA MORNING POST, Aug. 25, 1997, at 1 (reporting Loh's acceptance of the proposed provisions concerning candidates with foreign passports as not "unfair" and her intention to give up her foreign passport, and reporting Emily Lau's contention that the provisions were not "right" and her consideration of a legal challenge); Yeung, *supra* note 582, at 6 (quoting Martin Lee).

<sup>631</sup> See, e.g., Choy & Chan, *supra* note 628, at 8 (describing liberal objections to restrictions on seats for foreign passport holders); Lee, *supra* note 630, at 1 (describing plans for a court challenge to restrictions on foreign passport-holding candidates).



that tinkered with the laws governing the C.F.A.<sup>632</sup> In addition and in an apparent effort to garner support or acquiescence from the people and the business community, S.A.R. sources (and favorable coverage in the P.R.C. media) have emphasized the high quality and continuity of justice that Hong Kong's new top jurists would provide. Making arguments that were unavailable during the pre-reversion conflicts over the Court's structure, jurisdiction and establishment date, these sources pointed to the rich experience in Hong Kong law that the permanent members bring to the Court, to the presence of British Law Lords and other distinguished foreign jurists on the temporary judges list, and, implicitly, to the additional guarantee of judicial independence inherent in most of the permanent judges having rights of abode outside Hong Kong.<sup>633</sup> Hong Kong liberals' and democrats' responses

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<sup>632</sup> See *supra* Section 4.2.2.1. (discussing the Reunification Ordinance); Basic Law, *supra* note 21, art. 90 (requiring "endorsement" of the Legislature for Chief Executive's appointment of C.F.A. judges); Emma Batha, *Top Judge Expat Rule May Ease*, S. CHINA MORNING POST, Aug. 15, 1997, at 7 (describing plan to amend Court of Final Appeal Ordinance to allow a permanent C.F.A. justice, who does not meet citizenship and related requirements for Chief Justice, to serve as acting Chief Justice in case of the Chief Justice's absence or incapacity); *Court of Final Appeal Bill Tabled at Provisional Legislative Council*, New China News Agency, June 9, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (describing Provisional Legislature's pre-reversion consideration of amendment to the Court of Final Appeal Ordinance to incorporate requirements of Basic Law art. 90, which provides that the chief justice of the C.F.A. be a Chinese citizen permanently resident in the S.A.R. with no right of abode elsewhere); *Provisional Legislative Council Discusses Judicial Service Commission Bill*, New China News Agency, June 9, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (describing Provisional Legislature's pre-reversion consideration of the Judicial Service Commission (Amendment) Bill (1997), and amendment of related proposed legislation, that would help to preclude challenges to the appointment of C.F.A. judges on the ground that the members of the commission, whom Articles 88 and 90 of the Basic Law require to recommend C.F.A. nominees to the Chief Executive, would not have taken their oaths and become members of the commission prior to making recommendations for C.F.A. judges who were to be sworn in immediately after the reversion).

<sup>633</sup> See, e.g., *HK VIPs Welcome Chief Justice Recommendation*, New China News Agency, May 20, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (quoting Anson Chan's praise of Chief Justice nominee Andrew Li as "a very distinguished member of the Hong Kong bar" with "an outstanding record of public service," quoting Tung Chee-hwa's description of Li as "an outstanding lawyer . . . who is very highly regarded in legal and judicial circles," and quoting acting chief justice's comments that the selection would aid "a smooth transition in the judiciary,"

to these developments and arguments have been mixed and guarded. They appear to consider Chief Justice Andrew Li to be a fairly congenial choice, but some have expressed concern about the relatively modest calibre and status of many of the jurists on the list of temporary judges.<sup>634</sup> They seemed to find little that was troubling in the substance of minor post-reversion legislation affecting the Court, but doubtless saw cause for concern in the S.A.R. regime's apparently easy willingness to alter laws governing the Court.

Far more controversial has been the Hong Kong appellate court's July 1997 decision denying a challenge to the legality of

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which was "of fundamental importance" to Hong Kong); *Chief Executive Announces Recommendations for Appeal Court Permanent Judges*, New China News Agency, June 12, 1997, translated in BBC Summary of World Broadcasts, available in LEXIS, Asiapc Library, Allasi File (quoting Tung Chee-hwa's praise of the choices for C.F.A. permanent justices as "distinguished" members of the appellate bench and "outstanding legal practitioners before they joined the bench"); *Anson Chan in USA Defends Electoral Changes, Rule of Law*, *supra* note 585 (presenting Anson Chan's assertion that the agreement "to make available two of Britain's Law Lords" to serve on the C.F.A. "was universally applauded for the signal it sent about the independence of our judiciary and the quality of justice we can expect"); Batha, *supra* note 632, at 7 (noting that, aside from the chief justice, all of the permanent C.F.A. justices had foreign passports or rights of abode abroad). S.A.R. leaders' arguments stressing the continuity that the judicial appointments would provide recalled some of the arguments that the British colonial government made in seeking to justify and to promote acceptance of Tung's selection as Chief Executive.

<sup>634</sup> See, e.g., C.K. Lau, *A Man to Keep Faith in the Law*, S. CHINA MORNING POST, May 22, 1997, at 19 (noting that "unlike the election of Tung Chee-hwa as chief executive or Rita Fan Hsu Lai-tai to chair the provisional legislature, there has been no criticism implying Mr. Li is 'Beijing's man,'" and noting that Li's "'British' background," which included service on Legco and a lack of open criticism of the colonial regime, "should help allay fears" that Beijing's "influence may extend to the judiciary"); *Harmony Key to Rule of Law, Says Top Judge*, S. CHINA MORNING POST, Sept. 6, 1997, at 4 (quoting Chief Justice Li's statement that he was committed to the rule of law, including a free press and an independent legal profession, and that "[t]he judiciary is an institution that belongs to the community and serves the community" and takes "[c]ompetence, integrity and independence" as "its hallmarks"); May Sin-mi Hon, *15 Judges Selected to Sit on New Panel*, S. CHINA MORNING POST, July 23, 1997, at 1 (quoting Emily Lau's statement that she was "stunned and disappointed" by the list of temporary justices, and that the eleven Hong Kong-based judges on the list were not "up to the standard of judges in the Privy Council"); *The Non-Permanent Line-Up*, S. CHINA MORNING POST, Aug. 18, 1997, at 5 (listing names and background of those appointed to the list of eligible temporary justices).

the Provisional Legislature in *HKSAR v. Ma Kwan David & Ors.*<sup>635</sup> In a case that all sides viewed as an early indicator of the role of the courts and the fate of judicial review in the post-reversion era, the Court of Appeal rejected a criminal defendant's argument that the court could, and should, declare the Provisional Legislature illegal because it failed to conform to the requirements of the Basic Law or other Chinese law. Largely accepting the S.A.R. government's argument, the three judges concluded that S.A.R. courts lacked authority to review the "validity" of the decisions of the Chinese sovereign, whether made by the N.P.C. or its Standing Committee or the P.R.C.-established Preparatory Committee. The scope of the court's inquiry was limited to the "existence" of such sovereign acts, specifically whether the N.P.C. had established the Preparatory Committee and authorized it to create a Provisional Legislature, and whether the Preparatory Committee had established the Provisional Legislature pursuant to the authority that the N.P.C. had granted. There was, in the court's view, nothing further it could review concerning the lawfulness of the Provisional Legislature, once the judges determined that: the Basic Law and N.P.C. and N.P.C. Standing Committee decisions had retained discretion concerning the method for forming the body that would exercise legislative power in the S.A.R., and had provided for the creation of the Preparatory Committee and empowered it to do whatever was necessary to establish the first S.A.R. government (which included finding a solution to the problems created by the "derailing" of the "through train" for Legco); the Preparatory Committee had taken steps to establish a Provisional Legislature of limited powers and tenure to make possible the orderly establishment of an S.A.R. government; and the N.P.C. had ratified the Preparatory Committee's establishment of the Provisional Legislature after the fact.<sup>636</sup>

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<sup>635</sup> *HKSAR v. Ma Wai Kwan David & Ors*, 1997-2 HKC 315, 1997 HK LEXIS 57 (Hong Kong Court of Appeal, July 22, 1997).

<sup>636</sup> See generally *Ma*, 1997 HK LEXIS 57; see also *supra* note 609 and accompanying text. Like the court's related discussion of the Provisional Legislature question, its decision on the permissible scope of judicial review was not necessary to its principal holding that the Basic Law itself effected the adoption of the law under which defendants were charged, the survival of the indictment, and the establishment of the S.A.R. court by which the defendants were being tried. The court's conclusion that the Provisional Legislature was not the first S.A.R. legislature, and thus not subject to the election and

In the court's conclusions and in much of its analysis, leading liberals and democrats have found signs that the worst fears they had raised in pre-reversion debates over the C.F.A. were coming true. They argued that the court's statement of the limits to its jurisdiction, and its unwillingness to strike down a body that failed to conform to the Basic Law, marked the beginning of the end of judicial review and of the rule of law that depended on strong and independent courts being willing and able to check unconstitutional and other unlawful government action.<sup>637</sup> As some of the territory's most prominent pro-democracy politicians and commentators saw it, the court had "bow[ed] to power," "automatically narrowed [S.A.R. courts'] jurisdiction," accepted the cession to China of direct legislative authority over Hong Kong, and invited the betrayal of Hong Kong's promised autonomy. These critics also dismissed as spurious the claims by the decision's defenders that the ruling constituted a victory for the rule of law or that a contrary ruling would have created a dangerous "legal vacuum" in which many criminal acts would have been immune from prosecution.<sup>638</sup>

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composition requirements that the Basic Law and other N.P.C. decisions imposed, provided yet another ground for holding against the defendants that did not depend on the court's answer to the questions concerning its jurisdiction.

<sup>637</sup> See Erickson & Law, *supra* note 610, at 18 (quoting Martin Lee's comment that the court's decision "raises very serious implications for the future of Hong Kong's rule of law and autonomy," and former legislator James To Kun-sun's comment, "The idea that national laws cannot be challenged by local courts is not in accordance with the common law concept" of judicial review); Gargan, *supra* note 609, at A10 (quoting Martin Lee's comment that "[t]here must be something seriously wrong if the Chinese Central Government can introduce an appointed body, ignore the Basic Law at will, and Hong Kong courts cannot do anything about it"); Linda Choy & Genevieve Ku, *Fears as 'Bulwark of Basic Law Falls'*, S. CHINA MORNING POST, July 30, 1997, at 7 (quoting Frontier's statement that "[w]ith this ruling, Hong Kong is destroying the bulwark of the 'two systems' principle, thus inviting interference with its rule of law"); cf. Ng, *supra* note 615, at 19 (criticizing the court for adopting a vague concept of "unchallengeable acts of the sovereign" which claimed for S.A.R. courts less power than colonial courts had to "look into [the] validity and applicability in Hong Kong" of an act of Parliament).

<sup>638</sup> See, e.g., Choy & Ku, *supra* note 637 (quoting statement from the Frontier); Ng, *supra* note 615, at 19 (presenting former Legco member's criticism of the court for abdicating its role of judicial review and suggesting that "the N.P.C. reserves an unlimited, judicially unreviewable power to legislate for Hong Kong which it can exercise in any way and at any time it sees fit"; also presenting Ng's assertion that, contrary to the Solicitor General's

As some of these assertions suggest, additional arguments from the liberal-democratic perspective have addressed actual and prospective attitudes among Hong Kongers, and done so in terms generally familiar from pre-reversion battles over the C.F.A. and the rule of law. Liberal leaders warned Hong Kongers that the court's decision indicated that the courts were no longer available to "com[e] to the people's rescue" and to hear challenges to unjust or improper laws — or lawless decisions — that the S.A.R. or the Central People's Government might seek to impose. As some proponents of these arguments have seen it, the people (and presumably a rule-of-law-dependent business community) would recognize the threat this posed to the rule of law and Hong Kong's autonomy, and would oppose the erosion of legality, government accountability, and protection of Hong Kongers' interests countenanced in the court's ruling.<sup>639</sup>

Other arguments from some pro-democracy figures have departed a bit farther from pre-reversion precedents and addressed

argument for invoking the "doctrine of necessity" in the *Ma* case, "[n]o one . . . can advance the view that without a legislature from July 1, there would be legal vacuum and chaos); cf. Danny Gittings, *Our "Politically Correct" Courts*, S. CHINA MORNING POST, Aug. 3, 1997, at 10 (criticizing *Ma* court and a lower court which had dismissed Democrats' pre-reversion challenge to the Provisional Legislature for going "further than was necessary" in defining narrow limits to Hong Kong courts' roles when "upholding the provisional legislature's legality"); Ng, *supra* note 581 (arguing that the government's hailing of the *Ma* decision as a "victory for the rule of law" was one of several points "indicating a material," illiberal and anti-democratic "change in the direction of the rule of law and the style of administration" in Hong Kong).

<sup>639</sup> See, e.g., Choy & Ku, *supra* note 637, at 7 (quoting Democratic Party member and former legislator Albert Ho's comment that the opinion seemed to establish that "Hong Kong people will be able to do nothing if the NPC violates the Basic Law," and quoting Hong Kong Human Rights Monitor director Law Yuk-kai that "[w]hatever the mainland authorities do, there is no chance of the courts coming to the people's rescue," and United Front Against the Provisional Legislature leader Andrew Cheng Kar-foo's assertion that the court's decision "signals the beginning of allowing an autocratic government to control our people"); H.K. *Court Dismisses Legal Challenge to Constitution*, Asian Political News, Aug. 4, 1997, available in LEXIS, Asiapc Library, Allasi File (quoting Albert Ho's criticism that the court's ruling had cast into doubt "every citizen[s] right to take any issue up to the court" — a right that "is of tantamount importance" if "we are to preserve the rule of law in Hong Kong"); Lau, *supra* note 578, at 18 (presenting Frontier leader and former legislator Emily Lau's charge that "[t]he court's attempt to undermine the S.A.R. judiciary has caused alarm and dismay," leaving the Hong Kong people "worried" about "pressure on the courts" and surprised at the court's acting "so swiftly to undermine the autonomy of the SAR").

the question of Hong Kong courts' jurisdiction in more positivist terms. The arguments that leading liberal barrister Gladys Li, with her colleagues Margaret Ng and Paul Harris, made to the court in the *Ma* case perhaps necessarily moved in this direction. The same style of argument, however, seemed to characterize broader suggestions that the court's ruling and the government's arguments in the case reflected an opportunistic or hypocritical refusal by S.A.R. entities — themselves the creations of Chinese laws — to use the powers of judicial review, and to uphold the standards for a lawful legislature, that were set forth in laws that China and its Hong Kong allies had crafted. A considerable willingness to argue on positivist terms also has seemed to surface in some liberals' post-reversion calls for a strategy of using the Basic Law as a basis to challenge or criticize S.A.R. government actions.<sup>640</sup>

On the other side of the principal divide in the political conflict over Hong Kong's legal and institutional order, the S.A.R. government and some members of Hong Kong's pro-China circles welcomed the court's ruling as a victory for the rule of law and an independent judiciary. They also touted the government's willingness to abide by any decision the court might reach as proof of the government's commitment to the rule of law that is vital to Hong Kong's success. Such sources' apparent comfort

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<sup>640</sup> See, e.g., Ng, *supra* note 615, at 19 (presenting comments of Margaret Ng which criticize the court for its abandonment of its Basic Law-conferred power and duty to interpret the Basic Law, for failing to require the Provisional Legislature to satisfy the requirements of the Basic Law and other N.P.C. actions, for arguably permitting an amendment to the Basic Law — by means of the N.P.C.'s ratification or authorization of a non-conforming Provisional Legislature — that did not conform to Basic Law-mandated procedures, for upholding the suspect Reunification Ordinance after determining that the Basic Law included positive acts that solved the "legal vacuum" problem, and for suggesting that "there are two sources of law" — one that "emanates from the Basic Law" and another that consists of still-undefined "unchallengeable acts of the sovereign"); Ma, 1997 HK LEXIS 57, at \*42-\*43, \*80-\*81, \*120-\*121 (describing defense counsel Gladys Li's argument that the Basic Law gives S.A.R. courts the jurisdiction and obligation to examine and interpret the Basic Law, that the courts may and must therefore judge whether the Provisional Legislature was properly established and whether it conforms to the Basic Law and other N.P.C. enactments); Christine Loh, *Future Lies in Our Own Hands*, S. CHINA MORNING POST, July 14, 1997, at 16 (presenting Citizens' Party leader and pro-democracy former Legco member's argument that the Hong Kong people "can make the Basic Law a friend and use it to argue for change" toward universal suffrage and a stronger legislature).

with the positivist tone of the court's analysis, as well as its holding, suggested parallels to the China and pro-China camp's pre-reversion perspective on the courts and the rule of law.<sup>641</sup>

S.A.R. officials and pro-China politicians have further defended the ruling with arguments that have sought to draw support, and assuage concern, among the people. The Chief Executive asserted that the litigation not only demonstrated the new government's commitment to law, but also reflected the "respect" that "Hong Kong society" has for the rule of law. Broadly echoing the China and pro-China camp's assertions (and some of the colonial government's statements) concerning the C.F.A. and several other pre-reversion legal and institutional issues, S.A.R. government officials proclaimed that the *Ma* decision has still claimed for the post-reversion Hong Kong courts a power of judicial review that is at least equal to what Hong Kong courts exercised during the colonial era.<sup>642</sup> Moreover, the Solicitor General (who argued the government's brief in the *Ma* case), broadly pro-China sources, and others have added that the people of Hong Kong still enjoy

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<sup>641</sup> Choy, *supra* note 586, at 1 (quoting Tung Chee-hwa's statement that the government had shown that it would argue its case in court and abide by the court's ruling, and that such legal challenges "are part and parcel of the Hong Kong legal system . . . [and] are part and parcel of the rule of law itself"); Anson Chan in *USA Defends Electoral Changes, Rule of Law*, *supra* note 585 (presenting Anson Chan's argument that, having won the "landmark case" challenging the Provisional Legislature, the government still "expect[ed] further challenges which we will meet in accordance with the law"); Li, *supra* note 611, at 6 (quoting Provisional Legislature President Fan's comment that the process and the outcome in the case "should strengthen our confidence in the independence of the judicial system and the rule of law in Hong Kong").

<sup>642</sup> See, e.g., *Text of Statement of Chief Executive Tung Chee-hwa*, TA KUNG PAO, July 30, 1997, at A1; Leung, *supra* note 592, at 21 (presenting S.A.R. Secretary for Justice Leung's assertion that, after the *Ma* case, "[t]he truth is that the rule of law in Hong Kong is at least as strong as ever" and that the *Ma* court's determination that the courts could not review the validity of the sovereign actions of the N.P.C. or its delegates was no more serious a restriction on judicial review than colonial Hong Kong courts' having "had no jurisdiction to challenge the validity of an Act of Parliament"); Ma, 1997 HK LEXIS 57, at \*41-\*44, \*79-\*80, \*82-\*84, \*122-\*123 (describing Solicitor General Fung's argument to the court that article 19 of the Basic Law provided for the continuation of existing, pre-reversion restrictions on the jurisdiction of courts and, thus, that the colonial Hong Kong courts' lack of jurisdiction to determine whether parliamentary legislation or imperial orders were lawful under the U.K.'s unwritten constitution or the Letters Patent established that S.A.R. courts lacked jurisdiction to determine the validity of actions by the N.P.C., or P.R.C. entities authorized by the N.P.C. under the Basic Law, other N.P.C. enactments or other national Chinese laws).

a variety judicial or political means to hold the S.A.R. and central governments to account, and are, in any event, much better off than they would have been if the court had declared the Provisional Legislature unconstitutional and thrown Hong Kong into a state of legal chaos.<sup>643</sup>

The other established political players in Hong Kong's endgame appear to have kept some distance from these initial post-reversion conflicts relating to the S.A.R. judiciary. Perhaps regarding the issues as largely local matters of staffing a court or deciding a particular case, or perhaps concluding that treating them as such was the prudent course for a departed sovereign reluctant to underscore its new impotence and a "resumed" sovereign eager to demonstrate respect for S.A.R. autonomy, the U.K. and the P.R.C. seem to have sought a low public profile, arguably even more than they did in connection with the other significant legal and institutional controversies of the S.A.R.'s first months.

#### 4.2.2.4. *The Chief Executive after Reversion*

Events and statements that have helped to define the role of the Chief Executive and his administration have been a final focus of legal and institutional controversy during the S.A.R.'s early months. The post-reversion conflicts over what the Chief Executive and the executive-led government are becoming, or

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<sup>643</sup> See, e.g., Parsons, *supra* note 611, at 1 (describing Solicitor General Daniel Fung's assertion that there remained "judicial avenues, petitions, legislation, administrative avenues and negotiations" to challenge N.P.C. decisions, and that the Provisional Legislature could still be challenged outside the S.A.R. by judicial or political means at the national or international levels); Erickson & Law, *supra* note 637, at 18 (quoting Fung's comment that it was "the height of absurdity" for those who brought the constitutional challenge in the *Ma* case "to cast doubt about the legal system or create a state of chaos in the name of rule of law"); Li, *supra* note 611, at 6 (noting that D.A.B. leader Tsang Yok-sing's urged Hong Kong's N.P.C. deputies to explore mechanisms to prevent procedurally improper N.P.C. amendments to the Basic Law, and quoting Provisional Legislature President Fan's welcoming the ruling for making it "very clear that the legality of the Provisional Legislative Council is sound and strong and what we are doing is legitimate"); cf. *Status of Provisional Legislature Yet to be Decided by Court of Final Appeal*, SING TAO JIH PAO, July 30, 1997, at A2 (approving of the court's conclusion that it was "impossible for a Hong Kong court to overrule a decision made by the N.P.C." and asserting that "Hong Kong people" nonetheless could still "oppose [N.P.C. decisions] through other channels" and "should not improperly belittle themselves" by thinking that they cannot").



should become, have continued many of the themes evident in pre-reversion controversies over the selection and activities of the Chief Executive-designate, with fairly subtle variations on established themes. The high degree of continuity is unsurprising, given that much of the endgame debate over the Chief Executive had focused explicitly on expectations and exhortations concerning Tung's use of the office after July 1, 1997.

Broadly echoing the pre-reversion arguments of the Chief Executive-designate and pro-China sources, Tung and other S.A.R. leaders have pointed to several characteristics of the new leadership that are consistent with positivist principles of legality and are expected to appeal to the people and the business community. They have asserted that the S.A.R. regime's appointments of senior officials have yielded a government that is broadly representative and suited to the needs and unique characteristics of Hong Kong and its people. In comments that have been equally in keeping with pre-reversion arguments from the P.R.C. and the colonial authorities, Tung and his supporters have also emphasized the continuity in government that his administration's legal and policy choices and its retention of experienced officials will provide.<sup>644</sup>

Again playing the nationalism card that he and the pro-China camp had deployed in the twilight of colonial rule, Tung also has appealed to the people of Hong Kong to unite behind his administration and to accept the new legal restrictions on political organizations and activities that might threaten state security and order. Largely updating pre-reversion arguments from the Chief Executive-designate and the pro-China camp, Tung and proponents of his administration have asserted, with some credibility, that the people and the business community support the policies and appointments that the Chief Executive has pursued since taking office, and strongly desire the prosperity they are helping to preserve.<sup>645</sup> Indeed, two of the most controversial legislative

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<sup>644</sup> See, e.g., Zhang Shouying, "I am a Servant of the Hong Kong People" — Interview with Tung Chee-hwa, RENMIN RIBAO, June 23, 1997, at 2 (reporting Tung's assertion that the S.A.R. Exco "enjoys the advantages of the past appointment system and represents broader sections of the people, particularly grass-roots representatives").

<sup>645</sup> See, e.g., *id.* (reporting Tung's assertions that "personnel arrangements have enjoyed widespread support in Hong Kong," that surveys by three major foreign chambers of commerce in Hong Kong show 90% confidence, that

initiatives during the S.A.R.'s first months — the freezing of labor laws passed on the eve of the last colonial Legco's dissolution, and new immigration restrictions imposed on mainland children — seem to have played well with business and popular audiences, respectively.

In the initial months of the S.A.R., Hong Kong's liberals and democrats have also addressed the Chief Executive question with arguments similar to those they advanced during the final months of colonial rule. Martin Lee and others have continued to urge Tung to defend the interests of Hong Kong and Hong Kongers, and have warned that Tung's moves on rights legislation and elections foretell an early end to Tung's "honeymoon" with the Hong Kong people, as well as a threat to Hong Kong's rule of law upon which the people and the business community depend.<sup>646</sup>

Nonetheless, the post-reversion debates about the Chief Executive and his administration exhibit some significant discontinuities with pre-reversion conflicts. The assertions concerning popular attitudes toward specific appointments to office and the immigration and labor laws reflect inevitable changes in the legal and policy foci of arguments that address broader rule-of-law-related questions. On both sides of the debates, there also has been a striking "localization" of the conflict, as well as a decline in attention to the underlying, fundamental issue of the legitimacy of the office and the selection process. On the "pro-Tung" side, the source of the arguments has changed perhaps even more

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"people from all walks of life are confident" in the economy, and that "we should place even more emphasis on 'one country' in the one country, two systems formula"; Danny Gittings, *Polls Give Lie to Election Claims*, *supra* note 629, at 10 (noting Tung's 82% approval rating as a plausible indicator of support for his policies); Maggie Farley, *Hong Kong Leader Puts Emphasis on Family, China*, L.A. TIMES, July 2, 1997, at A1 (quoting Tung's statement that "economic vitality" and "sustain[ing] economic growth" were top priorities).

<sup>646</sup> Braude, *supra* note 581, at 11 (quoting Martin Lee's statement that he was "still waiting for [Tung] to show that he is actually standing up for Hong Kong's freedoms and not China's spokesman or apologist"); No Kwai-yan, *Tung "Disappoints" Democrats*, S. CHINA MORNING POST, Sept. 21, 1997, at 2 (similar); Linda Choy, *Lawyer Deplores Bill of Rights Rollback*, S. CHINA MORNING POST, July 18, 1997, at 4 (quoting human rights lawyer's critique of the suspension of a bill extending Bill of Rights to private sector as reflecting S.A.R. regime's bad attitude toward the rule of law); Ho, *supra* note 582, at 21 (concluding that "[r]ecent moves by Mr. Tung have made it increasingly difficult for even more tolerant citizens to give the new administration the benefit of the doubt").

extensively than in the other legal and institutional controversies of the post-reversion period. Since taking office, the Chief Executive and his administration have been arguing increasingly on their own behalf, with P.R.C. and even local pro-China sources playing a more subdued role in praising or defending the Chief Executive-led institutional order developing in the S.A.R.

On the other side, liberals' and democrats' arguments have shifted their substantive focus, perhaps more thoroughly than in other conflicts over laws and institutions during the S.A.R.'s early months. They have placed less emphasis on the claim that Tung will be China's puppet or that his selection was fatally flawed, and more on the fear that he and others in key S.A.R. institution will betray the interests of Hong Kong by trying to do what they think China wants even if Chinese officials have not yet pressured them to do so.<sup>647</sup> Having been in a difficult and ambivalent position with respect to the Chief Executive question before reversion, the now-departed colonial masters have been especially reticent to engage publicly in this aspect of the post-reversion process of shaping and evaluating the S.A.R.'s initial legal and institutional order.

#### 4.3. *Assessing Hong Kong's Endgame*

Thus far, developments in post-reversion Hong Kong suggest that transitional Hong Kong's endgame most nearly approaches the "end of the game / on-going games" model identified in *Endgame I*. During the S.A.R.'s initial months, that type of endgame's characteristic patterns of considerable continuity and moderate change appear to be evident in the identity and roles of key participants, in the legal and political questions over which those participants have clashed, in the character of arguments they have made about principles of legality and sovereignty and about the actual and potential attitudes of the people and the business community.

In addition to these developments with respect to particular political actors and specific issues and audiences, the possible links between Hong Kong's reversion and the seeming localization,

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<sup>647</sup> See, e.g., Braude, *supra* note 581, at 11 (quoting Martin Lee's statement that his "worry is not that [the P.R.C.] will actually be giving orders to Tung" but that Tung might "try to second guess China and give them what they never even asked").

depolarization and fragmentation that have marked the conflicts of the S.A.R.'s infancy reinforce the impression that the third, intermediate type of endgame may best fit the limited available evidence. The withdrawal of British colonial authorities, the dismantling of P.R.C.-established and not-purely-Hong Kong transitional bodies, and the full establishment of S.A.R. laws, institutions and offices appear to have created a newly local locus for legal and political conflict and to have shifted the substantive focus to even more specific, more clearly "sub-constitutional" questions of S.A.R. laws and institutions. Lessened polarization appears a relatively unsurprising consequence, as combatants in the sharp conflicts of the pre-reversion endgame and earlier battles have lost familiar targets and have had to assess and address new or newly important entities that have less clear and perhaps less settled allegiances in the clash of legal-political visions, and less established images in the eyes of the people or the business community. Considerable fragmentation could be expected to follow as well, as established actors may have begun to develop divergent interpretations of their changed political and institutional environment, and conflicting assessments of what their respective "visions" demand or permit with respect to issues that seem very loosely or complexly linked to basic principles of positivist legality or substantive justice.

Viewed in this context, the more serious disagreements among Hong Kong liberals and democrats and among broadly "pro-China" elements in the territory, or more frequent coalitions across the fault lines dividing "vision"-based camps, or even the emergence of political strategies that more frankly recognize divisions within key social constituencies, are potentially significant post-reversion changes that need not represent a qualitative break with the pre-reversion endgame. Although marking the beginning of a "new game," the changes in institutional contexts and specific topics of legal-institutional conflict that appear to have attended these developments seem to suggest discontinuity that stops short of an abandonment of vision-based politics or the quest for broad support from "the people" or "the business community."<sup>648</sup> In these respects, the final, formal transfer of

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<sup>648</sup> The seemingly increased prominence of "positivist" arguments in the post-reversion repertoire of liberals and democrats need not mark the qualitative shift away from "vision"-based politics that might mark a technical

power over Hong Kong, the establishment of S.A.R. institutions and the shift toward more "sub-constitutional" issues thus may prove to be analogous to the Tiananmen Incident, Patten's arrival and longer term "structural" forces that triggered the commencement of the endgame. At the end of the endgame, dramatic political changes and more diffuse imperatives to address more concrete legal and institutional questions may again have combined to produce a new "game" in which already-established participants, who continued to hew to long-held visions, engaged in a newly fragmented and differently polarized politics of addressing new, but not entirely novel, issues and long-present, but differently perceived, social constituencies.

Any such conclusion must remain tentative, however. The success or failure of principal parties' strategies of cultivating social constituencies as "assets" for post-reversion conflicts remains unknown, beyond the general point that, at least for now, stronger forms of liberal-democratic arguments have not fared well with much of the business community and perhaps with significant segments of the general population. More fundamentally, the discontinuity between Hong Kong's pre-reversion endgame and the "games" of the S.A.R. period may prove to be much sharper than it initially appears, and the "technical" endgame then may provide a better model. With the passage of even a relatively brief period or the occurrence of a major crisis, it may become clear that the role of the U.K. (and the outside world more generally) has indeed shrunk to nothing, or that China will exercise extensively and intrusively the power over Hong Kong that, in practice and in P.R.C. legal theory, it has always held and has enhanced with Hong Kong's reversion.<sup>649</sup> The fissures dividing

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endgame. As the discussion in *Endgame I* and in this Article have noted, liberals and democrats in Hong often invoked the Basic Law and the Joint Declaration alongside appeals to normative first principles during the pre-reversion period. As the discussion in Section 4.2., *supra*, suggests, liberals' and democrats' appeals to normative first principles have continued in the S.A.R. era. On the other hand, the "deals" struck and the arrangements imposed during the pre-reversion endgame have not been so well-settled during the S.A.R.'s opening months that a colloquial endgame seems to have occurred. As the discussion in Section 4.2. indicates, the judicial challenge to the Provisional Legislature and the political opposition to a number of early moves by the S.A.R. government reflect a continuing battle to revisit and revise legal and institutional arrangements that were nominally settled on the eve of reversion.

<sup>649</sup> The U.K.'s assertion that it will insist that China adhere to the pledges China has made in the Joint Declaration (which Britain regards as a fully

liberals and democrats may prove much more salient than the principles that have united them, and the differences separating the D.A.B. from its P.R.C. mentors and the S.A.R. administration may overwhelm the ties that once bound them together in a broadly positivist camp. A more clearly defined pro-business political block, strongly linked to the S.A.R. administration, may take shape as an important new participant and could force sharp departures from pre-reversion patterns of conflict over one of the two key social constituencies. In such a context, possible "populist" and "pro-business" coalitions might define a new principal cleavage in Hong Kong politics that would group key participants very differently than the "vision"-based politics of the pre-reversion years.<sup>650</sup> In extreme circumstances, the character, roles and even the existence of S.A.R. laws and institutions might undergo rapid change in any number of directions that would soon render pre-reversion "deals" irrelevant.

In this technical endgame scenario, some liberals' resort to more positivism-accepting arguments during the S.A.R.'s early days could appear in retrospect to be a significant shift away from "vision"-based politics at a moment when the advent of a new "game" made efforts to hold Hong Kong's new rulers to their

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binding treaty at international law) have been noted above. The United States has committed to promote the same general ends through a variety of means, including conditioning retention of Hong Kong's preferential trade status on China's keeping Hong Kong "sufficiently autonomous," with sufficient autonomy to be determined with reference to the terms of the Joint Declaration. 22 U.S.C. § 5722. See generally The United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701-32 (1996) (providing the principal statutory framework governing post-reversion U.S.-Hong Kong relations); Kerry Dumbaugh, *The U.S. Role During and After Hong Kong's Transition*, 18 U. PA. J. INT'L ECON. L. 333 (1997) (reviewing the U.S.-Hong Kong Policy Act and other legal and policy mechanisms available to the U.S. to promote continuity, autonomy and adherence to the Joint Declaration in post-reversion Hong Kong).

<sup>650</sup> See, e.g., Maggie Farley, *Interview: Tsang Yok-sing on the Role of Democracy, Communism in Chinese Hong Kong*, L.A. TIMES, July 6, 1997, at M3 (reporting D.A.B. leader Tsang Yok-sing's view that conflicts between "loyalty" to Hong Kong and to the Chinese Communist Party may escalate considerably in the future, given that "there could be certain changes in the policy" of the Party); Ho, *supra* note 607, at 21 (discussing early post-reversion controversies that point to the possibility of a populist alliance between Democrats and the D.A.B.); Yeung, *supra* note 602, at 17 (noting views that Tung's agenda sought, perhaps awkwardly, to combine electoral laws that would appeal to the business community with housing and other economic policies that would appeal to a populist constituency).

own post-reversion laws — rather than attempts to invoke transcendent and timeless normative principles to bind those rulers — became the most promising remaining weapon in the arsenal of politically weak participants in struggles over laws and institutions. Similarly, key participants' relative lack of focus on the attitudes of the business community in the months following reversion may later seem to have reflected an early recognition of changes in the business community's political influence, roles and identity that, in part, defined the terms of the post-reversion period's "new game." In these and other respects, the initial semblance of continuity with pre-reversion patterns will have proven illusory.

The mistaken initial impression that pre-reversion patterns and bargains might be surviving the reversion then will appear to have reflected the mundane fact that even a sharp and sudden break with the past could not be expected to occur completely, or become evident, at the stroke of midnight on June 30, 1997. It may also have reflected the principal players' desire to preserve a contrary impression during the S.A.R.'s initial months. An appearance of continuity would have had considerable appeal for the P.R.C., which had long preached "convergence" and pledged "continuity" between Hong Kong's immediate pre-reversion and post-reversion legal and institutional orders, for Hong Kong's pro-democracy forces and the British, who had reason to fear that any sharp disjunction would accelerate the erosion of their pre-reversion levels of power and influence, and for S.A.R. officials and pro-business politicians, who might enhance their own legitimacy and popularity by claiming to implement pre-reversion legal and institutional deals or directives that promised to preserve prior pro-business laws, institutions, policies and practices.

Alternatively, the degree of continuity between the final pre-reversion period and the S.A.R. era may be greater than early signs of moderate disjunction and uncertainty suggest, and a colloquial endgame may eventually provide a more convincing account of Hong Kong's transition. In the S.A.R.'s first months, the S.A.R. laws and institutions shaped during the pre-reversion endgame arguably have already been surviving significant challenges, in the courts' handling of challenges to the Provisional Legislature's constitutionality and more mundane matters, in the preparations for what appears likely to be broadly accepted legislative elections in 1998, and in the administration's pressing

forward with controversial laws and economic policies and its handling of the stock market and currency shocks of late 1997.<sup>651</sup> If the passage of more time and the arrival of new crises do not produce a fundamental departure from — or a displacement of — the S.A.R.'s initial legal and institutional arrangements, then the specter of irrelevance or evanescence that inevitably haunts new and untested institutions will fade. The changes in laws, institutions, issues, and the roles and orientations of participants and social constituencies that will surely occur then will appear to have been meaningfully constrained by the arrangements that many of the same participants crafted or accepted during the endgame of the middle 1990s.

In this colloquial endgame scenario, any sense that substantial discontinuity characterized the immediate aftermath of reversion will appear to have reflected a short-sighted emphasis on short-lived difficulties of the transition, or a failure to see the forest for the trees. In retrospect, Hong Kong liberals' turn to more positivism-accepting arguments could seem to be the product of the peculiar litigation-centered contexts in which much of that turn occurred, or a lasting but limited turn in that direction may be found to have had strong roots in liberals' fairly frequent invocations of the Basic Law and Joint Declaration to supplement their more natural law-rooted arguments during the pre-reversion endgame. Similarly, the early S.A.R. era's fairly open splits between the D.A.B. and other "pro-China" elements and S.A.R. officials later may seem to reflect the unusual character of the issues (most notably labor rights) or the moment (when alignments in the Provisional Legislature and within the administration seemed unusually fluid or uncertain), or to be merely newly

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<sup>651</sup> See *supra* Section 4.2.2. (describing the Provisional Legislature's enactment of legislation on a wide range of sometimes-controversial subjects, the government's role in proposing, supplementing and interpreting such legislation, and the courts' handling of challenges to the Provisional Legislature); see also Angela Li, *Stage Set for Final Court's Debut*, S. CHINA MORNING POST, July 26, 1997, at 1; Charlotte Parsons, *Drug Case Review a First for Court of Final Appeal*, S. CHINA MORNING POST, Sept. 24, 1997, at 8; Charlotte Parsons, *Muffled Start for New Court*, S. CHINA MORNING POST, Sept. 12, 1997, at 4 (all describing the C.F.A.'s initial docket, which did not include a challenge to the Provisional Legislature but did include commercial and criminal law cases). See generally Henny Sender, *Red October*, FAR E. ECON. REV., Nov. 6, 1997, at 70-73 (describing the stock market and currency crises and the Hong Kong government's response); Seth Faison, *Hong Kong Stocks Fall Steeply, New Victim of Region's Ills*, N.Y. TIMES, Oct. 23, 1997, at D1 (similar).



visible manifestations of long-standing divisions that were less prominent, but still perceptible, during the pre-reversion endgame.

In addition, the notion that a new business block has emerged to alter the mix of principal participants and key audiences may prove misplaced as well, with any apparent consolidation behind Tung's administration perhaps unravelling amid varied degrees of distress and comfort in business circles with the Chief Executive's embrace of industrial policy and increased spending for housing, or perceptions of P.R.C. influence on (or frustration with) the S.A.R. regime's economic policies and laws. More importantly, what seem potentially to be major institution-defining moments of the initial post-reversion period may only reflect another facet of the undramatic point that real-world games often do not conclude as suddenly and completely as simple models suggest. With hindsight, early post-reversion battles over the legal changes effected by the Reunification Ordinance, the constitutionality of the Provisional Legislature, and the electoral arrangements for the first S.A.R. legislature may look like belated and merely gap-filling installments in a single, primarily pre-reversion, colloquial endgame that did not end neatly on July 1, 1997.

In sum, an "end of the game / on-going games" paradigm seems to fit best with the patterns that have emerged in the protracted struggle that adherents to broadly liberal-democratic and P.R.C.-style positivist visions of legality and sovereignty have waged over the legal and institutional issues of Hong Kong's endgame and over the attitudes and allegiances of the people of Hong Kong and Hong Kong's business community. The principal political participants' pre-reversion approaches to the conflicts among themselves and over the two key social constituencies were suited to this type of endgame, for they were compatible with expectations that the participants were involved in a technical endgame, a colloquial endgame, or an endgame of this intermediate, "end of the game / on-going games" type. The still-sketchy developments of the post-reversion period have not yet yielded enough information to provide a conclusive answer to the question of which of these three types of endgame best approximates transitional Hong Kong's experience. Subsequent developments could lead to either a colloquial or a technical endgame model's seeming to provide, in retrospect, a more persuasive account of the impact of the principled and pragmatic struggles over rule-of-law values, institutions, the people and the business

community that the principal sections of this Article and *Endgame I* have examined. In these circumstances, a conclusion that transitional Hong Kong seems to have ended one game in a series of on-going, evolving games must be cautious and preliminary. Indeed, even the usually confident oracle of Hong Kong's future legal and political order Martin Lee has warned that it will be too soon to judge Hong Kong's legal, institutional and political fate for some time, perhaps for years.<sup>652</sup>

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<sup>652</sup> Braude, *supra* note 581 (quoting Martin Lee's statements that he is "an eternal optimist" but that friends of civil liberties, democracy and the rule of law would "have to live from anniversary to anniversary" because early tolerance could offer limited reassurance where one could not "know" that a crackdown or betrayal "won't happen tomorrow"). Lee added that "people will become more comfortable" if "this first month" of relatively benign S.A.R. rule "becomes a year." *Id.* Uncharacteristically and seemingly disingenuously, Lee asserted that he "never sat down and tried to think seriously about what is going to actually happen" and about whether the P.R.C. will interfere with Hong Kong's laws and institutions. *Id.*